THE GENERAL STATUTES OF NORTH CAROLINA

1987 CUMULATIVE SUPPLEMENT

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of
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Volume 2C, Part II

Chapters 90 to 97

Annotated through 356 S.E.2d 26. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume.

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Preface

This Cumulative Supplement to Replacement Volume 2C, Part II contains the general laws of a permanent nature enacted by the General Assembly at the 1987 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1987 Regular Session affecting Chapters 90 through 97 of the General Statutes.

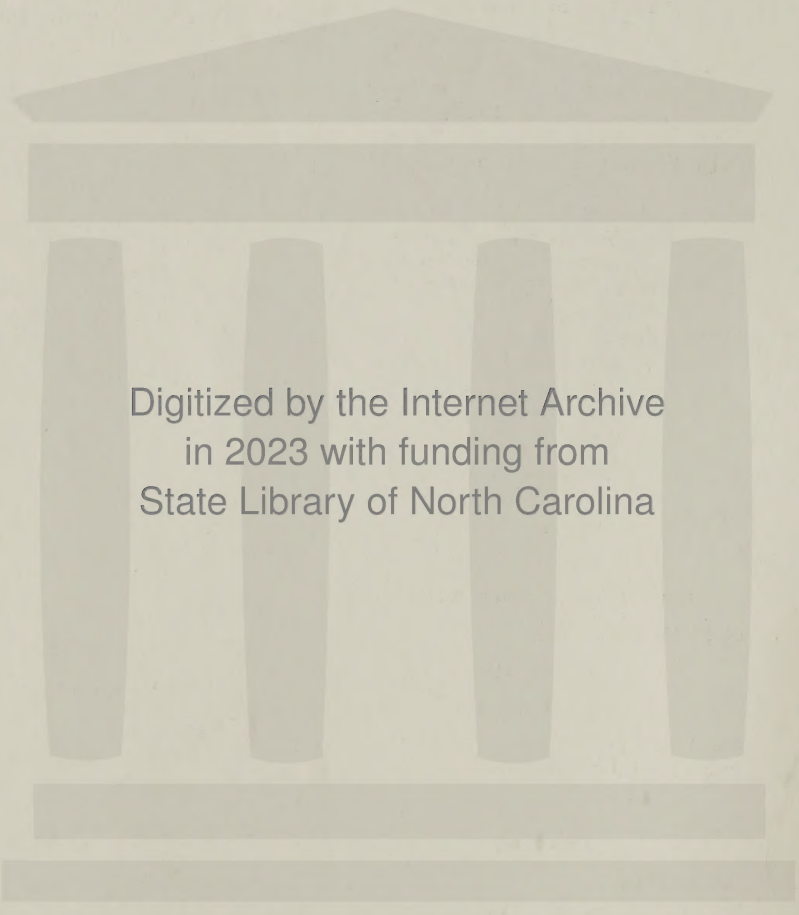
Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 319, p. 464.
North Carolina Court of Appeals Reports through Volume 85, p. 173.
South Eastern Reporter 2nd Series through Volume 356, p. 26.
Federal Reporter 2nd Series through Volume 817, p. 761.
Federal Supplement through Volume 658, p. 304.
Federal Rules Decisions through Volume 115, p. 78.
Bankruptcy Reports through Volume 72, p. 618.
Supreme Court Reporter through Volume 107, p. 2210.
North Carolina Law Review through Volume 65, p. 847.
Wake Forest Law Review through Volume 22, p. 424.
Campbell Law Review through Volume 9, p. 206.
Duke Law Journal through 1987, p. 190.
North Carolina Central Law Journal through Volume 16, p. 222.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included herein. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1A, Part I for the complete User's Guide.



The General Statutes of North Carolina
1987 Cumulative Supplement

Chapter 90.

Medicine and Allied Occupations.

ARTICLE 1.

Practice of Medicine.

§ 90-8. Officers may administer oaths, and subpoena witnesses, records and other materials.

The president and secretary of the Board may administer oaths to all persons appearing before it as the Board may deem necessary to perform its duties, and to summon and to issue subpoenas for the appearance of any witnesses deemed necessary to testify concerning any matter to be heard before or inquired into by the Board, and to order that any documents or other material concerning any matter to be heard before or inquired into by the Board shall be produced before the Board or made available for inspection. Upon written request, the Board shall revoke a subpoena if, upon a hearing, it finds that the evidence the production of which is required does not relate to a matter in issue, or if the subpoena does not describe with

sufficient particularity the evidence the production of which is required, or if for any other reason in law the subpoena is invalid. (1913, c. 20, s. 7; C.S., s. 6612; Ex. Sess. 1921, c. 44, s. 3; 1953, c. 1248, s. 1; 1975, c. 690, s. 1; 1979, c. 107, s. 8; 1987, c. 859, s. 5.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and applicable to disciplinary actions commenced in suits filed on or after that date, rewrote this section.

§ 90-14. Revocation, suspension, annulment or denial of license.

(a) The Board shall have the power to deny, annual, suspend, or revoke a license, or other authority to practice medicine in this State, issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:

(1) Immoral or dishonorable conduct;

(2) Producing or attempting to produce an abortion contrary to law;

(3) Made false statements or representations to the Board, or who has willfully concealed from the Board material information in connection with his application for a license;

(4) Repealed by Session Laws 1977, c. 838, s. 3.

(5) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of alcohol, drugs, chemicals, or any other type of material or by reason of any physical or mental abnormality. The Board is empowered and authorized to require a physician licensed by it to submit to a mental or physical examination by physicians designated by the Board before or after charges may be presented against him, and the results of examination shall be admissible in evidence in a hearing before the Board;

(6) Unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, whether the same is committed in the course of his practice or otherwise, and whether committed within or without North Carolina;

(7) Conviction in any court of a crime involving moral turpitude, or the violation of a law involving the practice of medicine, or a conviction of a felony; provided that a felony conviction shall be treated as provided in subsection (c) of this section;

(8) By false representations has obtained or attempted to obtain practice, money or anything of value;

(9) Has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he has been educated;

(10) Adjudication of mental incompetency, which shall automatically suspend a license unless the Board orders otherwise;

(11) Lack of professional competence to practice medicine with a reasonable degree of skill and safety for patients. In this connection the Board may consider repeated acts of a physician indicating his failure to properly treat a patient and may require such physician to submit to inquiries or examinations, written or oral, by members of the Board or by other physicians licensed to practice medicine in this State, as the Board deems necessary to determine the professional qualifications of such licensee;

(12) Promotion of the sale of drugs, devices, appliances or goods for a patient, or providing services to a patient, in such a manner as to exploit the patient for financial gain of the physician; and upon a finding of the exploitation for financial gain, the Board may order restitution be made to the payer of the bill, whether the patient or the insurer, by the physician; provided that a determination of the amount of restitution shall be based on credible testimony in the record;

(13) Suspension or revocation of a license to practice medicine in any other state, or territory of the United States, or other country.

(14) The failure to respond, within a reasonable period of time and in a reasonable manner as determined by the Board, to inquiries from the Board concerning any matter affecting the license to practice medicine.

For any of the foregoing reasons, the Board may deny the issuance of a license to an applicant or revoke a license issued to him, may suspend such a license for a period of time, and may impose conditions upon the continued practice after such period of suspension as the Board may deem advisable, may limit the accused physician's practice of medicine with respect to the extent, nature or location of his practice as the Board deems advisable. The Board may, in its discretion and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked or rescinded.

(c) A felony conviction shall result in the automatic revocation of a license issued by the Board, unless the Board orders otherwise or receives a request for a hearing from the person within 60 days of receiving notice from the Board, after the conviction, of the provisions of this subsection. If the Board receives a timely request for a hearing in such a case, the provisions of G.S. 90-14.2 shall be followed.

(d) The Board and its members and staff may release confidential or nonpublic information to any health care licensure board in this State or another state about the issuance, denial, annulment, suspension, or revocation of a license, or the voluntary surrender of a license by a Board-licensed physician, including the reasons for the action, or an investigative report made by the Board. The Board shall notify the physician within 60 days after the information is transmitted. A summary of the information that is being transmitted shall be furnished to the physician. If the physician requests, in writing, within 30 days after being notified that such information has been transmitted, he shall be furnished a copy of all information so transmitted. The notice or copies of the information shall not be provided if the information relates to an ongoing criminal investigation by any law-enforcement agency, or authorized Department

of Human Resources personnel with enforcement or investigative responsibilities.

(e) The Board and its members and staff shall not be held liable in any civil or criminal proceeding for exercising, in good faith, the powers and duties authorized by law. (C.S., s. 6618; 1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; 1953, c. 1248, s. 2; 1969, c. 612, s. 4; c. 929, s. 6; 1975, c. 690, s. 4; 1977, c. 838, s. 3; 1981, c. 573, ss. 9, 10; 1987, c. 859, ss. 6-10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and applicable to disciplinary actions commenced in suits filed on or after that date, rewrote subdivision (a)(7), rewrote subdivision (a)(12), added subdivision (a)(14), and added subsections (c), (d) and (e).

§ 90-14.13. Reports of disciplinary action by health care institutions; immunity from liability.

The chief administrative officer of every licensed hospital or other health care institution in the State shall, after consultation with the chief of staff of such institution, report to the Board any revocation, suspension, or limitation of a physician's privileges to practice in that institution. Each such institution shall also report to the Board resignations from practice in that institution by persons licensed under this Article. The Board shall report all violations of this subsection known to it to the licensing agency for the institution involved.

The chief administrative officer of each insurance company providing professional liability insurance for physicians who practice medicine in North Carolina, the administrative officer of the Liability Insurance Trust Fund Council created by G.S. 116-220, and the administrative officer of any trust fund operated by a hospital authority, group, or provider shall report to the Board within 30 days:

(1) Any award of damages or settlement affecting or involving a physician it insures, or

(2) Any cancellation or nonrenewal of its professional liability coverage of a physician, if the cancellation or nonrenewal was for cause.

The Board may request details about any action and the officers shall promptly furnish the requested information. The reports required by this section are privileged and shall not be open to the public. The Board shall report all violations of this paragraph to the Commissioner of Insurance.

Any person making a report required by this section shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person knew the report was false or acted in reckless disregard of whether the report was false. (1981, c. 573, s. 14; 1987, c. 859, s. 11.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and applicable to disciplinary actions commenced in suits filed on or after that date, inserted the present second and third paragraphs.

§ 90-15. License fee; salaries, fees, and expenses of Board.

Each applicant for a license by examination shall pay to the treasurer of the Board of Medical Examiners of the State of North Carolina a fee which shall be prescribed by said Board in an amount not exceeding the sum of four hundred dollars ($400.00) plus the cost of test materials before being admitted to the examination. Whenever any license is granted without examination, as authorized in G.S. 90-13, the applicant shall pay to the treasurer of the Board a fee in an amount to be prescribed by the Board not in excess of two hundred fifty dollars ($250.00). Whenever a limited license is granted as provided in G.S. 90-12, the applicant shall pay to the treasurer of the Board a fee not to exceed one hundred fifty dollars ($150.00), except where a limited license to practice in a medical education and training program approved by the Board for the purpose of education or training is granted, the applicant shall pay a fee of twenty-five dollars ($25.00). A fee of twenty-five dollars ($25.00) shall be paid for the issuance of a duplicate license. All fees shall be paid in advance to the treasurer of the Board of Medical Examiners of the State of North Carolina, to be held by him as a fund for the use of said Board. The compensation and expenses of the members and officers of the said Board and all expenses proper and necessary in the opinion of the Board to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of said fund, upon the warrant of the said Board and all expenses proper and necessary in the opinion of the officers and members of said Board shall be fixed by the Board but shall not exceed one hundred dollars ($100.00) per day per member for time spent in the performance and discharge of his duties as a member of said Board, and reimbursement for travel and other necessary expenses incurred in the performance of his duties as a member of said Board. Any unexpended sum or sums of money remaining in the treasury of said Board at the expiration of the terms of office of the members thereof shall be paid over to their successors in office.

For the initial and annual registration of an assistant to a physician, the Board may require the payment of a fee not to exceed a reasonable amount. (1858-9, c. 258, s. 13; Code, s. 3130; Rev., s. 4501; 1913, c. 20, ss. 4, 5; C.S., s. 6619; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; 1953, c. 187; 1969, c. 929, s. 4; 1971, c. 817, s. 2; c. 1150, s. 5; 1977, c. 838, s. 4; 1979, c. 196, s. 1; 1981, c. 573, s. 15; 1983 (Reg. Sess., 1984), c. 1063, s. 1; 1985, c. 362, ss. 1-3; 1987, c. 859, ss. 13, 14.)

Effect of Amendments. —

The 1987 amendment, effective October 1, 1987, and applicable to disciplinary actions commenced in suits filed on or after that date, rewrote the first sentence and substituted "one hundred dollars ($100.00)" for "ten dollars ($10.00)" in the sixth sentence.

§ 90-15.1. Registration every two years with Board.

Every person heretofore or hereafter licensed to practice medicine by said Board of Medical Examiners shall, during the month of January, 1958, and during the month of January in every even-numbered year thereafter, register with the secretary-treasurer of said Board his name and office and residence address and such other information as the Board may deem necessary and shall pay a registration fee fixed by the Board not in excess of one hundred dollars ($100.00). In the event a physician fails to register as herein provided he shall pay an additional amount of twenty dollars ($20.00) to the Board. Should a physician fail to register and pay the fees imposed, and should such failure continue for a period of 30 days, the license of such physician may be suspended by the Board, after notice and hearing at the next regular meeting of the Board. Upon payment of all fees and penalties which are due, the license of the physician may be reinstated, subject to the Board requiring the physician to appear before the Board for an interview and to comply with other licensing requirements. (1957, c. 597; 1969, c. 929, s. 5; 1979, c. 196, s. 2; 1983 (Reg. Sess., 1984), c. 1063, s. 2; 1987, c. 859, s. 12.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and applicable to disciplinary actions commenced in suits filed on or after that date, rewrote the last sentence.

§ 90-18. Practicing without license; practicing defined; penalties.

CASE NOTES

IV. Naturopaths.

I. GENERAL CONSIDERATION.

Lack of Criminal Intent Not a Defense. — The burden rested upon defendants to know whether their conduct was prohibited by this section, and because a lack of criminal intent does not constitute a valid defense, the court was under no duty to instruct the jury on the defendants' intent. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

Unorthodox Treatment of Terminally Ill. — This section is not unconstitutional on the grounds that the terminally ill have a fundamental right to choose unorthodox medical treatment unconstitutionally infringes upon this fundamental right. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

Burden of Proving Exception. — Once the State produces evidence of one committing acts that satisfy the definition of "practicing medicine or surgery" within the meaning of this section, it is incumbent upon defendant to introduce evidence that his actions fell within one of the exceptions thereto. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

Instruction that Defendant Did Not Fall within Exception. — If the defendant fails to produce evidence that his actions fell within one of the exceptions, the jury need not consider the exceptions to the statute and a jury instruction to that effect is a correct statement of the law. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

IV. NATUROPATHS.

Prosecution Not Unconstitutionally Selective. — State's prosecution

against defendants, who held themselves out as naturopathic practitioners and treated cancers, did not constitute selective prosecution in violation of their rights to equal protection under the Fourteenth Amendment. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

OPINIONS OF ATTORNEY GENERAL

Post-operative care of cataract surgery patients falls within the definition of optometry when performed by a licensed optometrist, and does not constitute the unauthorized practice of medicine where there are no complications as a result of the surgery. See opinion of Attorney General to Mr. Bryant D. Paris, Jr., Executive Director, Board of Medical Examiners, 56 N.C.A.G. 5 (1986).

§ 90-18.1. Limitations on physician assistants.

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

§ 90-18.2. Limitations on nurse practitioners.

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

Article 1A.

Treatment of Minors.

§ 90-21.5. Minor's consent sufficient for certain medical health services.

(a) Any minor may give effective consent to a physician licensed to practice medicine in North Carolina for medical health services for the prevention, diagnosis and treatment of (i) venereal disease and other diseases reportable under G.S. 130A-135, (ii) pregnancy, (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance. This section does not authorize the inducing of an abortion, performance of a sterilization operation, or admission to a 24-hour facility licensed under Article 2 of Chapter 122C of the General Statutes except as provided in G.S. 122C-222. This section does not prohibit the admission of a minor to a treatment facility upon his own written application in an emergency situation as authorized by G.S. 122C-222.

(1971, c. 35; 1977, c. 582, s. 2; 1983, c. 302, s. 2; 1985, c. 589, s. 31; 1985 (Reg. Sess., 1986), c. 863, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "or admission to a 24-hour facility licensed under Article 2 of Chapter 122C of the General Statutes except as provided in G.S. 122C-222" for "commitment to a mental institution or hospital for confinement or treatment of a mental condition" at the end of the second sentence of subsection (a).

CASE NOTES

A state cannot require a minor to obtain parental consent for an abortion unless it provides an alternative procedure whereby authorization can be obtained for the abortion. North Carolina has no such alternative procedure. Wilkie v. Hoke, 609 F. Supp. 241 (W.D.N.C. 1985).

Minor plaintiff's common law ability to void agreement to arbitrate, one of the provisions of an informed consent form which she signed in consenting to an abortion, was not changed by statute and did not deprive her of her constitutional right to an abortion. Wilkie v. Hoke, 609 F. Supp. 241 (W.D.N.C. 1985).

Article 1B.

Medical Malpractice Actions.

§ 90-21.11. Definitions.

As used in this Article, the term "health care provider" means without limitation any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital as defined by G.S. 131-126.1(3); or a nursing home as defined by G.S. 130-9(e)(2); or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home.

As used in this Article, the term "medical malpractice action" means a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider. (1975, 2nd Sess., c. 977, s. 4; 1987, c. 859, s. 1.)

Editor's Note. —

Sections 130-9(e)(2) and 131-126.1(3), referred to in this section, were repealed by Session Laws 1983, c. 775, s. 1. As to health care facilities and services, see now Chapter 131E.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and applicable to disciplinary actions commenced in suits filed on or after that date, rewrote the catchline and added the second paragraph.

Legal Periodicals. —

For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

For note suggesting the need for a new tort of breach of confidence, in light of Watts v. Cumberland County Hospital System, 75 N.C. App. 1, 330 S.E.2d 242 (1985), see 8 Campbell L. Rev. 145 (1985).

CASE NOTES

Cited in Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839 (1986).

§ 90-21.12. Standard of health care.

Legal Periodicals. —

For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

For note suggesting the need for a new tort of breach of confidence, in light of Watts v. Cumberland County Hospital System, 75 N.C. App. 1, 330 S.E.2d 242 (1985), see 8 Campbell L. Rev. 145 (1985).

For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

For note, "Psychiatrists' Liability to Third Parties for Harmful Acts Committed by Dangerous Patients," see 64 N.C.L. Rev. 1534 (1986).

For note on expansion of the application of res ipsa loquitur in medical malpractice, in light of Parks v. Perry, 68 N.C. App. 202, 314 S.E.2d 287, pet'n for disc. rev. denied, 311 N.C. 761, 321 S.E.2d 142 (1984), see 21 Wake Forest L. Rev. 537 (1986).

For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

CASE NOTES

Violation of Health Care Regulation. — Although this section codifies the common-law obligation of the health care provider to the patient and establishes the standard of care, violation of a health care regulation may be proof of a negligent deviation from that standard of care. Griggs v. Morehead Mem. Hosp., 82 N.C. App. 131, 345 S.E.2d 430 (1986).

Showing When Breach Does Not Involve Special Skills. — When the alleged breach does not involve the rendering of or failure to render professional nursing or medical services requiring special skills, it is not necessary to establish the standard of due care prevailing among hospitals in like situations in order to develop a case of negligence. In such cases Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984) is not apposite. Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839 (1986).

A hospital has a duty to exercise ordinary care to keep its premises in a reasonably safe condition so as not to expose the patient unnecessarily to danger. Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839 (1986).

The duty a hospital owes its patients is to exercise reasonable or ordinary care to maintain in a reasonably safe condition that part of the hospital designed for the patients' use. This duty imparts the additional duties owed to an invitee, that is, the duty to warn the patient of hidden unsafe conditions and the duty to discover hidden unsafe conditions by reasonable inspection and supervision. However, these duties are limited to unsafe conditions of which the hospital has notice. Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839 (1986).

Duty of Physician in Rendering Family Planning Services. — Whatever a woman's reason for desiring to avoid pregnancy, when a physician undertakes to provide medical care or advice to her for that purpose, he must provide professional services in that case, just as in the rendering of professional services in any instance, according to the established professional standards. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

A claim for "wrongful conception" or "wrongful pregnancy" is recognizable in this State. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

A cause of action for wrongful birth must exist in North Carolina when a health care provider negligently provides counseling and information which induces a couple to conceive a defective child. Gallagher v. Duke Univ., 638 F. Supp. 979 (M.D.N.C. 1986).

Damages for "Wrongful Conception". — In an action for "wrongful conception," plaintiff wife may recover damages for the expenses associated with her pregnancy, but plaintiffs may not recover for the costs of rearing their child. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

Defendants owed no duty to child who had not yet been conceived regarding genetic counseling rendered to her parents, and they could not be found liable to her on a wrongful life theory.

Gallagher v. Duke Univ., 638 F. Supp. 979 (M.D.N.C. 1986).

As to application of res ipsa loquitur in medical malpractice actions, see Schaffner v. Cumberland County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985), cert. denied, 316 N.C. 195, 341 S.E.2d 578, — N.C. —, 341 S.E.2d 579 (1986).

A physician's assistant is not subject to the same standard of practice as a medical doctor. Paris v. Kreitz, 75 N.C. App. 265, 331 S.E.2d 234, cert. denied, 315 N.C. 185, 337 S.E.2d 858 (1985).

§ 90-21.13. Informed consent to health care treatment or procedure.

Legal Periodicals. —

For note suggesting the need for a new tort of breach of confidence, see 8 Campbell L. Rev. 145 (1985).

For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

For comment surveying North Carolina's treatment of the doctrine of informed consent, see 21 Wake Forest L. Rev. 757 (1986).

CASE NOTES

Informed consent by an experimental subject is required in the nontherapeutic context where the researcher does not have as an objective to benefit the subject. Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986).

Disclosure of Risks in Nontherapeutic Context. — While informed consent in the nontherapeutic context would have similarities with informed consent in the nonexperimental therapeutic context controlled by this section, the degree of required disclosure of risks is higher in the nontherapeutic context than is required under this section. Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986).

This section would not be applied per se in the nontherapeutic context to determine the standards for informed consent. Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986).

For case comparing standards of care under this section and under the Nuremberg Code and 45 C.F.R. § 46.116(a)(2), see Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986).

Duty of Physician in Rendering Family Planning Services. — Whatever a woman's reason for desiring to avoid pregnancy, when a physician undertakes to provide medical care or advice to her for that purpose, he or she must provide the professional services in that case, just as in the rendering of professional services in any instance, according to the established professional standards. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

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§ 90-21.14. First aid or emergency treatment; liability limitation.

Legal Periodicals. — For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

Article 1C.

Physicians and Hospital Reports.

§ 90-21.20. Reporting by physicians and hospitals of wounds, injuries and illnesses.

Editor's Note. — This Article, as enacted by Session Laws 1971, c. 4, and amended by Session Laws 1971, c. 594, was applicable to New Hanover and Alamance Counties only, and was therefore not codified. The 1971 act was amended by Session Laws 1977, c. 31, and by Session Laws 1977, c. 843, s. 1, effective July 1, 1977, and is now applicable to thirty counties. The 1977 acts having rendered the 1971 act general within the definition adopted for the General Statutes, this Article is now codified.

Session Laws 1971, c. 4, s. 2, as amended by Session Laws 1971, c. 594; 1977, c. 31, s. 1; and 1977, c. 843, s. 1, now provides: "This act shall apply only to Alamance, Avery, Beaufort, Buncombe, Craven, Davidson, Davie, Durham, Forsyth, Gaston, Guilford, Hertford, Hyde, Iredell, Martin, Mecklenburg, Montgomery, New Hanover, Onslow, Polk, Randolph, Robeson, Rockingham, Rowan, Stanly, Stokes, Surry, Union, Wake and Wayne Counties."

Article 1D.

Peer Review.

§ 90-21.22. Peer review agreements.

(a) The Board of Medical Examiners may, under rules adopted by the Board in compliance with Chapter 150B of the General Statutes, enter into agreements with the North Carolina Medical Society and its local medical society components for the purpose of conducting peer review activities. Peer review activities to be covered by such agreements shall include investigation, review, and evaluation of records, reports, complaints, litigation and other information about the practices and practice patterns of physicians licensed by the Board, and shall include programs for impaired physicians.

(b) Peer review agreements shall include provisions for the society to receive relevant information from the Board and other sources, conduct the investigation and review in an expeditious manner, provide assurance of confidentiality of nonpublic information and of the review process, make reports of investigations and evaluations to the Board, and to do other related activities for promoting a coordinated and effective peer review process. Peer review agreements shall include provisions assuring due process.

(c) Each society which enters a peer review agreement with the Board shall establish and maintain a program for impaired physicians licensed by the Board for the purpose of identifying, review-

ing, and evaluating the ability of those physicians to function as physicians and to provide programs for treatment and rehabilitation. The Board may provide funds for the administration of impaired physician programs and shall adopt rules with provisions for definitions of impairment; guidelines for program elements; procedures for receipt and use of information of suspected impairment; procedures for intervention and referral; monitoring treatment, rehabilitation, post-treatment support and performance; reports of individual cases to the Board; periodic reporting of statistical information; assurance of confidentiality of nonpublic information and of the review process.

(d) Upon investigation and review of a physician licensed by the Board, or upon receipt of a complaint or other information, a society which enters a peer review agreement with the Board shall report immediately to the Board detailed information about any physician licensed by the Board if:

(1) The physician constitutes an imminent danger to the public or to himself;

(2) The physician refuses to cooperate with the program, refuses to submit to treatment, or is still impaired after treatment and exhibits professional incompetence; or

(3) It reasonably appears that there are other grounds for disciplinary action.

(e) Any confidential patient information and other nonpublic information acquired, created, or used in good faith by a society pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in the peer review or impaired physician programs of this section shall be required in a civil case to disclose any information acquired or opinions, recommendations, or evaluations acquired or developed solely in the course of participating in any agreements pursuant to this section.

(f) Peer review activities conducted in good faith pursuant to any agreement under this section shall not be grounds for civil action under the laws of this State and are deemed to be State directed and sanctioned and shall constitute State action for the purposes of application of antitrust laws. (1987, c. 859, s. 15.)

Editor's Note. — Session Laws 1987, c. 859, s. 20 makes this Article effective October 1, 1987, and applicable to disciplinary actions commenced in suits filed on or after that date.

§ 90-21.23. Election by State.

For the purpose of making applicable in the State the early opt-in provisions of Title 4 of the "Health Care Quality Improvement Act of 1986," P.L. 99-660, the State elects to exercise on October 1, 1987, the provisions of Title 4, Section 411(c)(2)(A) of that act to promote good faith professional review activities. (1987, c. 859, s. 19.)

Editor's Note. — Session Laws 1987, c. 859, s. 20 makes this section effective October 1, 1987, and applicable to disciplinary actions commenced and suits filed on or after that date.

Article 2.

Dentistry.

§ 90-39. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules and regulations not exceeding the following:

(1) Each application for general dentistry examination	$200.00
(2) Each general dentistry license renewal, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dentist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dentist	75.00
(3) Each provisional license	75.00
(4) Each intern permit or renewal thereof	75.00
(5) Each certificate of license to a resident dentist desiring to change to another state or territory	25.00
(6) Each license issued to a practitioner of another state or territory to practice in this State	125.00
(7) Each license to resume the practice issued to a dentist who has retired from and returned to this State	125.00
(8) Each instructor's license or renewal thereof	75.00

(1935, c. 66, s. 12; 1953, c. 564, s. 1; 1961, c. 446, s. 8; 1965, c. 163, s. 3; 1971, c. 755, s. 8; 1979, 2nd Sess., c. 1195, s. 12; 1987, c. 555, s. 1.)

Effect of Amendments. — The 1987 amendment, effective July 6, 1987, rewrote subdivisions (1) through (8).

Article 4A.

North Carolina Pharmacy Practice Act.

§ 90-85.21. Pharmacy permit.

(a) In accordance with Board regulations, each pharmacy in North Carolina shall annually register with the Board on a form provided by the Board. The application shall identify the pharmacist-manager of the pharmacy and all pharmacist personnel employed in the pharmacy. All pharmacist-managers shall notify the Board of any change in pharmacist personnel within 30 days of such change.

(b) Each physician who dispenses prescription drugs, for a fee or other charge, shall annually register with the Board on the form provided by the Board, and with the licensing board having jurisdiction over the physician. Such dispensing shall comply in all respects with the relevant laws and regulations that apply to phar-

macists governing the distribution of drugs, including packaging, labeling, and record keeping. Authority and responsibility for disciplining physicians who fail to comply with the provisions of this subsection are vested in the licensing board having jurisdiction over the physician. The form provided by the Board under this subsection shall be as follows:

Application For Registration
With The Pharmacy Board
As A Dispensing Physician

1.	2.
Name and Address of Dispensing Physician	Affix Dispensing Label Here

3. Physician's North Carolina License Number .....

4. Are you currently practicing in a professional association registered with the North Carolina Board of Medical Examiners? .....Yes .....No. If yes, enter the name and registration number of the professional corporation:

.....

.....

5. I certify that the information is correct and complete.

....
Signature Date

(1927, c. 28, s. 1; 1953, c. 183, s. 2; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1987, c. 687.)

Effect of Amendments. — The 1987 amendment, effective January 1, 1988, designated the existing language as subsection (a) and added subsection (b).

§ 90-85.24. Fees collectible by Board.

The Board of Pharmacy shall be entitled to charge and collect not more than the following fees: for the examination of an applicant for license as a pharmacist, one hundred fifty dollars ($150.00); for renewing the license as a pharmacist, forty dollars ($40.00); for renewing the license of an assistant pharmacist, ten dollars ($10.00); for licenses without examination as provided in G.S. 90-85.20, original, two hundred dollars ($200.00); for original registration of a drugstore, two hundred dollars ($200.00), and renewal thereof, one hundred dollars ($100.00). All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the Board. (1905, c. 108, s. 12; Rev., s. 4478; C.S., s. 6657; 1921, c. 57, s. 3; 1945, c. 572, s. 3; 1953, c. 183, s. 1; 1965, c. 676, s. 1; 1973, c. 1183; 1981, c. 72; c. 717, s. 3; 1981 (Reg. Sess., 1982), c. 1188, s. 2; 1983, c. 196, s. 8; 1987, c. 260.)

Effect of Amendments. — The 1987 amendment, effective June 2, 1987, substituted "one hundred fifty dollars ($150.00)" for "seventy-five dollars ($75.00)" and substituted "forty dollars ($40.00)" for "forty dollars ($.00) [sic]" in the first sentence.

§ 90-85.27. Definitions.

Editor's Note. —

Session Laws 1987, c. 738, s. 67(g) provides: "Dispensing of Generic Drugs. Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning."

"As used in this subsection 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' has the same meaning as in Section 502(e)(3) of the Federal Food, Drug and Cosmetic Act as amended, 21 U.S.C. 352(e)(3)."

§ 90-85.28. Selection by pharmacists permissible; prescriber may permit or prohibit selection; price limit on selected drugs.

Editor's Note. —

Session Laws 1987, c. 738, s. 67(g) provides: "Dispensing of Generic Drugs. Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning."

"As used in this subsection 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' has the same meaning as in Section 502(e)(3) of the Federal Food Drug and Cosmetic Act as amended, 21 U.S.C. 352(e)(3)."

§ 90-85.29. Prescription label.

Editor's Note. —

Session Laws 1987, c. 738, s. 67(g) provides: "Dispensing of Generic Drugs. Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning."

"As used in this subsection 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' has the same meaning as in Section 502(e)(3) of the Federal Food, Drug and Cosmetic Act as amended, 21 U.S.C. 352(e)(3)."

§ 90-85.30. Prescription record.

Editor's Note. —

Session Laws 1987, c. 738, s. 67(g) provides: "Dispensing of Generic Drugs. Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning."

"As used in this subsection 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' has the same meaning as in Section 502(e)(3) of the Federal Food, Drug and Cosmetic Act as amended, 21 U.S.C. 352(e)(3)."

§ 90-85.31. Prescriber and pharmacist liability not extended.

Editor's Note. —

Session Laws 1987, c. 738, s. 67(g) provides: "Dispensing of Generic Drugs. Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning."

"As used in this subsection 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' has the same meaning as in Section 502(e)(3) of the Federal Food, Drug and Cosmetic Act as amended, 21 U.S.C. 352(e)(3)."

Article 5.

North Carolina Controlled Substances Act.

§ 90-86. Title of Article.

CASE NOTES

Cited in State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466 (1986).

§ 90-87. Definitions.

As used in this Article:

(14a) The term "isomer" means, except as used in G.S. 90-87(17)(d), G.S. 90-89(c), G.S. 90-90(a)(4), and G.S. 90-95(h)(3), the optical isomer. As used in G.S. 90-89(c) the term "isomer" means the optical, position, or geometric isomer. As used in G.S. 90-87(17)(d), G.S. 90-90(a)(4), and G.S. 90-95(h)(3) the term "isomer" means the optical isomer or diastereoisomer.

(17) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical

synthesis, or by a combination of extraction and chemical synthesis:

a. Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.
b. Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause a, but not including the isoquinoline alkaloids of opium.
c. Opium poppy and poppy straw.
d. Cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocanized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, ss. 2-4; c. 1358, ss. 1, 15; 1977, c. 482, s. 6; 1981, c. 51, ss. 8, 9; c. 75, s. 1; c. 732; 1985, c. 491; 1987, c. 105, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote subdivision (14a) and paragraph (17)d.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Johnson, 78 N.C. App. 68, 337 S.E.2d 81 (1985).

II. "DELIVER" OR "DELIVERY."

"Deliver" means actual, constructive, or attempted transfer from one person to another of a controlled substance. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied and appeal dismissed, 316 N.C. 557, 344 S.E.2d 15 (1986).

Evidence of Constructive Delivery Held Sufficient. — Evidence that defendant allowed agent to pick up a bag of cocaine from scales and place it under bed "for security purposes," from where the agent later retrieved it, was sufficient evidence of constructive delivery to get to the jury for its evaluation and determination as to whether defendant knowingly delivered 400 grams or more of a mixture containing cocaine. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied and appeal dismissed, 316 N.C. 557, 344 S.E.2d 15 (1986).

Remuneration Need Not Be Shown. — To prove delivery, the State is not required to prove that defendant received remuneration for the transfer. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied and appeal dismissed, 316 N.C. 557, 344 S.E.2d 15 (1986).

III. "MANUFACTURE."

"Processing" is to subject the controlled substance to a particular method, system, technique of preparation or treatment to bring about a desired result. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

When Intent to Distribute Is Necessary Element. — Intent to distribute is not a necessary element of the offense of manufacturing a controlled substance unless the manufacturing activity is preparation or compounding. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

In those cases where production, propagation, conversion or processing of a controlled substance is involved, the intent of the defendant, either to distrib-

ute or consume personally, will be irrelevant and does not form an element of the offense. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

The intent to distribute was not necessary for a violation of subdivision (15) of this section, where defendant was indicted for the cutting of cocaine (dilution of a controlled substance). State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

Evidence Sufficient to Show Manufacture of Heroin. — Evidence held ample to give rise to a reasonable inference that defendant manufactured heroin by packing controlled substance. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

IV. "MARIJUANA."

Failure of Defendant to Show Material Was Not "Marijuana". — Trial court did not err in permitting case in which 12,410 pounds of marijuana plants, including stalks, and plastic pipes, was seized, where defendant failed to show that enough of the material seized did not qualify as marijuana. State v. Grainger, 78 N.C. App. 123, 337 S.E.2d 77, supersedeas granted, 315 N.C. 186, 338 S.E.2d 107 (1985).

§ 90-88. Authority to control.

(a) The Commission may add, delete, or reschedule substances within Schedules I through VI of this Article on the petition of any interested party, or its own motion. In every case the Commission shall give notice of and hold a public hearing pursuant to G.S. 150B prior to adding, deleting or rescheduling a controlled substance within Schedules I through VI of this Article, except as provided in subsection (d) of this section. A petition by the Commission, the North Carolina Department of Justice, or the North Carolina Board of Pharmacy to add, delete, or reschedule a controlled substance within Schedules I through VI of this Article shall be placed on the agenda, for consideration, at the next regularly scheduled meeting of the Commission, as a matter of right.

(a1) In making a determination regarding a substance, the Commission shall consider the following:

(1) The actual or relative potential for abuse;
(2) The scientific evidence of its pharmacological effect, if known;
(3) The state of current scientific knowledge regarding the substance;
(4) The history and current pattern of abuse;
(5) The scope, duration, and significance of abuse;
(6) The risk to the public health;
(7) The potential of the substance to produce psychic or physiological dependence liability; and
(8) Whether the substance is an immediate precursor of a substance already controlled under this Article.

(d) If any substance is designated, rescheduled or deleted as a controlled substance under federal law, the Commission shall similarly control or cease control of, the substance under this Article unless the Commission objects to such inclusion. The Commission, at its next regularly scheduled meeting that takes places [place] 30 days after publication in the Federal Register of a final order scheduling a substance, shall determine either to adopt a rule to similarly control the substance under this Article or to object to such action. No rule-making notice or hearing as specified by G.S. 150B is required if the Commission makes a decision to similarly control a substance, but any rule so adopted shall be filed pursuant to

Article 5 of Chapter 150B. However, if the Commission makes a decision to object to adoption of the federal action, it shall initiate rule-making procedures pursuant to G.S. 150B within 180 days of its decision to object.

(h) Repealed by Session Laws 1987, c. 413, s. 4, effective June 18, 1987.

(1971, c. 919, s. 1; 1973, c. 476, s. 128; cc. 524, 541; c. 1358, ss. 2, 3, 15; 1977, c. 667, s. 3; 1981, c. 51, s. 9; 1987, c. 413, ss. 1-4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 18, 1987, rewrote subsections (a) and (d), inserted subsection (a1), and deleted subsection (h), relating to the mailing of notice when a substance is designated, rescheduled or deleted as a controlled substance.

§ 90-89. Schedule I controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse, no currently accepted medical use in the United States, or a lack of accepted safety for use in treatment under medical supervision. The following controlled substances are included in this schedule:

(a) Any of the following opiates, including the isomers, esters, ethers, salts and salts of isomers, esters, and ethers, unless specifically excepted, or listed in another schedule, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

1. Acetylmethadol.
1a. Repealed by Session Laws 1987, c. 412, s. 2, effective June 18, 1987.
2. Allylprodine.
3. Alphacetylmethadol.
4. Alphameprodine.
5. Alphamethadol.
5a. Alpha-methylfentanyl (N-(1-(alpha-methyl-beta-phenyl) ethyl-4-piperidyl) propionalilide; 1(1-methyl-2-phenyl-ethyl)-4-(N-propanilido) piperidine).
6. Benzethidine.
7. Betacetylmethadol.
8. Betameprodine.
9. Betamethadol.
10. Betaprodine.
11. Clonitazene.
12. Dextromoramide.
13. Diampromide.
14. Diethylthiambutene.
15. Difenoxin.
16. Dimenoxadol.
17. Dimepheptanol.
18. Dimethylthiambutene.
19. Dioxaphetyl butyrate.
20. Dipipanone.

21. Ethylmethylthiambutene.
22. Etonitazene.
23. Etoxeridine.
24. Furethidine.
25. Hydroxypethidine.
26. Ketobemidone.
27. Levomoramide.
28. Levophenacylmorphan.
28a. 1-methyl-4-phenyl-4-propionoxypiperidine (MPPP).
28b. 3-Methylfentanyl (N-[3-methyl-1-(2-Phenylethyl)-4-Piperidyl]-N-Phenylpropanamide).
29. Morpheridine.
30. Noracymethadol.
31. Norlevorphanol.
32. Normethadone.
33. Norpipanone.
34. Phenadoxone.
35. Phenampromide.
35a. 1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine (PEPAP).
36. Phenomorphan.
37. Phenoperidine.
38. Piritramide.
39. Proheptazine.
40. Properidine.
41. Propiram.
42. Racemoramide.
42a. Tilidine.
43. Trimeperidine.

(b) Any of the following opium derivatives, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Acetorphine.
2. Acetyldihydrocodeine.
3. Benzylmorphine.
4. Codeine methylbromide.
5. Codeine-N-Oxide.
6. Cyprenorphine.
7. Desomorphine.
8. Dihydromorphine.
9. Etorphine (except hydrochloride salt).
10. Heroin.
11. Hydromorphinol.
12. Methyldesorphine.
13. Methyldihydromorphine.
14. Morphine methylbromide.
15. Morphine methylsulfonate.
16. Morphine-N-Oxide.
17. Myrophine.
18. Nicocodeine.
19. Nicomorphine.
20. Normorphine.
21. Pholcodine.
22. Thebacon.
23. Drotebanol.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. 3, 4-methylenedioxyamphetamine.
2. 5-methoxy-3, 4-methylenedioxyamphetamine.

2a. 3, 4-Methylenedioxymethamphetamine (MDMA).

3. 3, 4, 5-trimethoxyamphetamine.
4. Bufotenine.
5. Diethyltryptamine.
6. Dimethyltryptamine.
7. 4-methyl-2, 5-dimethoxyamphetamine.
8. Ibogaine.
9. Lysergic acid diethylamide.
10. Mescaline.
11. Peyote, meaning all parts of the plant presently classified botanically as Lophophora Williamsii Lemaire, whether growing or not; the seeds thereof; any extract from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seed or extracts.
12. N-ethyl-3-piperidyl benzilate.
13. N-methyl-3-piperidyl benzilate.
14. Psilocybin.
15. Psilocyn.
16. 2, 5-dimethoxyamphetamine.
17. 4-bromo-2, 5-dimethoxyamphetamine.
18. 4-methoxyamphetamine.
19. Ethylamine analog of phencyclidine. Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl) ethylamine, N-(1-phenylcyclohexyl) ethylamine, cyclohexamine, PCE.
20. Pyrrolidine analog of phencyclidine. Some trade or other names: 1-(1-phenycyclohexyl)-pyrrolidine, PCPy, PHP.
21. Thiophene analog of phencyclidine. Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, TCP.
22. Parahexyl.

(e) Stimulants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances having as stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

1. Fenethylline.
2. N-ethylamphetamine. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 844; c. 1358, ss. 4, 5, 15; 1975, c. 443, s. 1; c. 790; 1977, c. 667, s. 3; c. 891, s. 1; 1979, c. 434, s. 1; 1981, c. 51, s. 9; 1983, c. 695, s. 1; 1985, c. 172, ss. 1-3; 1987, c. 412, ss. 1-5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 18, 1987, deleted paragraph (a)1a, which read "Alfentanil," added paragraphs (a)28a, (a)28b, (a)35a, (c)2a, and (e)2, and rewrote paragraph (b)13, which read "Methylhydromorphine."

CASE NOTES

Cited in State v. Pulliam, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

§ 90-90. Schedule II controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse; currently accepted medical use in the United States, or currently accepted medical use with severe restrictions; and the abuse of the substance may lead to severe psychic or physical dependence. The following controlled substances are included in this schedule:

(a) Any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, unless specifically excepted or unless listed in another schedule:

1. Opium and opiate, and any salt, compound, derivative, or preparation of opium and opiate, excluding apomorphine, nalbuphine, dextrorphan, naloxone, naltrexone and nalmefene, and their respective salts, but including the following:
   (i) Raw opium.
   (ii) Opium extracts.
   (iii) Opium fluid extracts.
   (iv) Powdered opium.
   (v) Granulated opium.
   (vi) Tincture of opium.
   (vii) Codeine.
   (viii) Ethylmorphine.
   (ix) Etorphine hydrochloride.
   (x) Hydrocodone.
   (xi) Hydromorphone.
   (xii) Metopon.
   (xiii) Morphine.
   (xiv) Oxycodone.
   (xv) Oxymorphone.
   (xvi) Thebaine.
2. Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph 1 of this subdivision, except that these substances shall not include the isoquinoline alkaloids of opium.
3. Opium poppy and poppy straw.
4. Cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include

decocanized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

5. Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrine alkaloids of the opium poppy).

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation unless specifically exempted or listed in other schedules:

01. Alfentanil.
1. Alphaprodine.
2. Anileridine.
3. Bezitramide.
4. Dihydrocodeine.
5. Diphenoxylate.
6. Fentanyl.
7. Isomethadone.
8. Levomethorphan.
9. Levorphanol.
10. Metazocine.
11. Methadone.
12. Methadone — Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
13. Moramide — Intermediate, 2-methyl-3-morpholino-1, 1-diphenyl-propane-carboxylic acid.
14. Pethidine.
15. Pethidine — Intermediate — A, 4-cyano-1-methyl-4-phenylpiperidine.
16. Pethidine — Intermediate — B, ethyl-4-phenylpiperidine-4-carboxylate.
17. Pethidine — Intermediate — C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
18. Phenazocine.
19. Piminodine.
20. Racemethorphan.
21. Racemorphan.
22. Sufentanil.

(e) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product. [Some other names: (6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo[b,d]pyran-1-o1, or (-)-delta-9-(trans)-tetrahydrocannabinol]. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 6; c. 1358, ss. 6, 15; 1975, c. 443, s. 2; 1977, c. 667, s. 3; c. 891, s. 2; 1979, c. 434, s. 2; 1981, c. 51, s. 9; 1983, c. 695, s. 2; 1985, c. 172, ss. 4, 5; 1987, c. 105, s. 3; c. 412, ss. 5A-7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Session Laws 1987, c. 105, s. 3, effective October 1, 1987, rewrote subdivision (a)4.

Session Laws 1987, c. 412, ss. 5A-7, effective June 18, 1987, inserted "dextrorfan" and substituted "naltrexone, and nalmefene" for "and neltroxone" in paragraph (a)1, and added paragraph (b)01 and subdivision (e).

CASE NOTES

Legislature's use of the word "mixture" in §§ 90-95 (h)(4) establishes that the total weight of dosage units of Dilaudid is a sufficient basis to charge a suspect with trafficking. State v. Jones, — N.C. App. —, 354 S.E.2d 251 (1987).

§ 90-91. Schedule III controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a potential for abuse less than the substances listed in Schedules I and II; currently accepted medical use in the United States; and abuse may lead to moderate or low physical dependence or high pyschological dependence. The following controlled substances are included in this schedule:

(b) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system unless specifically exempted or listed in another schedule:

1. Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.
2. Chlorhexadol.
3. Glutethimide.
4. Lysergic acid.
5. Lysergic acid amide.
6. Methyprylon.
7. Sulfondiethylmethane.
8. Sulfonethylmethane.
9. Sulfonmethane.

9a. Tiletamine and zolazepam or any salt thereof. Some trade or other names for tiletamine-zolazepam combination product: Telazol. Some trade or other names for tiletamine: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone. Some trade or other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-[3,4-e][1,4]-diazepin-7 (1H)-one. flupyrazapon.

10. Any compound, mixture or preparation containing
    (i) Amobarbital.
    (ii) Secobarbital.
    (iii) Pentobarbital.
    or any salt thereof and one or more active ingredients which are not included in any other schedule.
11. Any suppository dosage form containing
    (i) Amobarbital.
    (ii) Secobarbital.
    (iii) Pentobarbital.

or any salt of any of these drugs and approved by the federal Food and Drug Administration for marketing as a suppository.

(j) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of said isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically excluded or listed in some other schedule.

1. Benzphetamine.
2. Chlorphentermine.
3. Clortermine.
4. Repealed by Session Laws 1987, c. 412, s. 10, effective June 18, 1987.
5. Phendimetrazine. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 5; c. 1358, ss. 7, 15; 1975, c. 442; 1977, c. 667, s. 3; 1979, c. 434, s. 3; 1981, c. 51, s. 9; 1987, c. 412, ss. 8-10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 18, 1987, added paragraph (b)9a, rewrote paragraph (j)3, which read "chlortermine," and deleted paragraph (j)4, which read "Mazindol."

§ 90-92. Schedule IV controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule III of this Article; currently accepted medical use in the United States; and limited physical or pyschological dependence relative to the substances listed in Schedule III of this Article. The following controlled substances are included in this schedule:

(a) Depressants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Alprazolam.
2. Barbital.
3. Bromazepam.
4. Camazepam.
5. Chloral betaine.
6. Chloral hydrate.
7. Chlordiazepoxide.
8. Clobazam.
9. Clonazepam.
10. Clorazepate.
11. Clotiazepam.
12. Cloxazolam.
13. Delorazepam.
14. Diazepam.

15. Estazolam.
16. Ethchlorvynol.
17. Ethinamate.
18. Ethyl loflazepate.
19. Fludiazepam.
20. Flunitrazepam.
21. Flurazepam.
22. Halazepam.
23. Haloxazolam.
24. Ketazolam.
25. Loprazolam.
26. Lorazepam.
27. Lormetazepam.
28. Mebutamate.
29. Medazepam.
30. Meprobamate.
31. Methohexital.
32. Methylphenobarbital (mephobarbital).
33. Midazolam.
34. Nimetazepam.
35. Nitrazepam.
36. Nordiazepam.
37. Oxazepam.
38. Oxazolam.
39. Paraldehyde.
40. Petrichloral.
41. Phenobarbital.
42. Pinazepam.
43. Prazepam.
44. Quazepam.
45. Temazepam.
46. Tetrazepam.
47. Triazolam.

(f) Narcotic Drugs. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

1. Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.
2. Buprenorphine. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, ss. 8, 15; c. 1446, s. 5; 1975, cc. 401, 819; 1977, c. 667, s. 3; c. 891, s. 3; 1979, c. 434, ss. 4-6; 1981, c. 51, s. 9; 1985, c. 172, ss. 6-8; 439, s. 1; 1987, c. 412, ss. 11, 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 18, 1987, rewrote subsection (a) and added paragraph (f)2.

§ 90-94. Schedule VI controlled substances.

CASE NOTES

Cited in State v. Damon, 78 N.C. App. 421, 337 S.E.2d 170 (1985); State v. Thomas, 81 N.C. App. 200, 343 S.E.2d 588 (1986).

§ 90-95. Violations; penalties.

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be punished as a Class I felon;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than two years or fined not more than two thousand dollars ($2,000), or both in the discretion of the court. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, including one-half gram or more of phencyclidine, the violation shall be punishable as a Class I felony. If the controlled substance is one gram or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony.

(3) A controlled substance classified in Schedule V shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars ($500.00), or both in the discretion of the court;

(4) A controlled substance classified in Schedule VI shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than 30 days or fined not more than one hundred dollars ($100.00), or both, in the discretion of the court, but any sentence of imprisonment imposed must be suspended and the judge may not require at the time of sentencing that the defendant serve a period of imprisonment as a special condition of probation. If the quantity of the controlled substance exceeds one-half of an ounce (avoirdupois) of marijuana or one-twentieth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, the violation shall be punishable as a general misdemeanor. If the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana or three-twentieths of an ounce

(avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 50 pounds, but less than 100 pounds, such person shall be punished as a Class H felon and shall be sentenced to a term of at least five years in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 100 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the

State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a term of at least 18 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a term of at least 45 years in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethyl-

amide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. A person sentenced under this subsection as a committed youthful offender shall be eligible for release or parole no earlier than that person would have been had he been sentenced under this subsection as a regular offender. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, coconspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(1971, c. 919, s. 1; 1973, c. 654, s. 1; c. 1078; c. 1358, s. 10; 1975, c. 360, s. 2; 1977, c. 862, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 4-7; 1983, c. 18; c. 294, s. 6; c. 414; 1985, c. 569, s. 1; c. 675, ss. 1, 2; 1987, c. 90; c. 105, ss. 4, 5; c. 640, ss. 1, 2; c. 783, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. —

Session Laws 1987, c. 90, effective April 24, 1987, rewrote the first sentence of subdivision (h)(5), which formerly read "A person sentenced under this subsection is not eligible for early release or early parole if the person is sentenced as a committed youthful offender and the sentencing judge may not suspend the sentence or place the person sentenced on probation."

Session Laws 1987, c. 105, ss. 4, 5, effective October 1, 1987, divided the former single sentence of subdivision (d)(2) into the present first and second sentences thereof, by deleting "but" at the beginning of the present second sentence, deleted "or one gram or more of cocaine" preceding "the violation shall

be punishable" near the end of the second sentence of subdivision (d)(2), added the present third sentence of subdivision (d)(2), and rewrote the introductory paragraph of subdivision (h)(3).

Session Laws 1987, c. 640, s. 1, effective July 20, 1987, added the first sentence of subdivision (h)(5).

Session Laws 1987, c. 640, s. 2, effective October 1, 1987, and applicable to offenses occurring on or after that date, added subdivision (h)(4a).

Session Laws 1987, c. 783, s. 4, effective August 12, 1987, rewrote s. 5 of Session Laws 1987, c. 105, which itself rewrote the introductory paragraph of subdivision (h)(3).

CASE NOTES

I. GENERAL CONSIDERATION.

Section Is Constitutional. — Subsection (h)(4) of this section is not unconstitutional under North Carolina Const., Art. I, § 6, the separation of power clauses, or under Art. I, § 19, the law of the land provision. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

The imposition of harsher penalties for the possession of a mixture of controlled substances with a larger mixture of lawful materials has a rational relation to a valid state objective, that is, the deterrence of large scale distribution of drugs. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Purpose. — One of the purposes of the Controlled Substances Act is to deter dealers in illicit drugs. State v. Horton, 75 N.C. App. 632, 331 S.E.2d 215, cert. denied, 314 N.C. 672, 335 S.E.2d 497 (1985).

Possession, manufacturing, and transporting heroin are separate and distinct offenses. Further, when a person commits any one of these offenses which involves four grams or more of heroin, he is guilty of trafficking. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Where there existed only one plot or plan, scheme or conspiracy, covering both possessing marijuana and manufacturing marijuana, the defendant could only be sentenced for one count of conspiracy. Sanderson v. Rice, 777 F.2d 902 (4th Cir. 1985), cert. denied, — U.S. —, 106 S. Ct. 1226, 89 L. Ed. 2d 336 (1986).

Possession of Cocaine Held Encompassed by Conspiracy to Sell and Deliver Same. — Each defendant could be convicted of only one conspiracy where conspiracy to sell and deliver cocaine necessarily encompassed possession of the substance, and thus judgments as to defendants' convictions of conspiracy to possess would be arrested. State v. Worthington, — N.C. App. —, 352 S.E.2d 695 (1987).

Possession and Sale of Heroin and Cocaine. — Although defendant possessed both heroin and cocaine at the same time and place, and sold both substances in the same transaction, he could be lawfully convicted of two possessing offenses and two selling offenses. State v. Horton, 75 N.C. App. 632, 331 S.E.2d 215, cert. denied, 314 N.C. 672, 335 S.E.2d 497 (1985).

Failure of Defendant to Show Material Was Not "Marijuana". — Trial court did not err in permitting case in which 12,410 pounds of marijuana plants, including stalks, and plastic pipes, was seized, where defendant failed to show that enough of the material seized did not qualify as marijuana. State v. Grainger, 78 N.C. App. 123, 337 S.E.2d 77, supersedeas granted, 315 N.C. 186, 338 S.E.2d 107 (1985).

Comment on Refusal to Render Assistance under Subdivision (h)(5). — Defendant's constitutional right to be free from compelled self-incrimination includes the right to choose, without the risk of being penalized before a jury, between the exercise of that right and the potential benefits which may later inure through a waiver thereof and the rendition of assistance as provided in subdivision (h)(5) of this section. State v. Worthington, — N.C. App. —, 352 S.E.2d 695 (1987).

District attorney's argument that defendants had the information necessary to avail themselves of the provisions of subdivision (h)(5) of this section and had an opportunity to render assistance but had declined to do so amounted to an impermissible comment upon defendants' exercise of their constitutional rights to remain silent. However, the trial court's error in overruling defendants' objection to the improper remark of the district attorney was harmless beyond a reasonable doubt, due to the overwhelming evidence of defendants'

guilt of the offenses for which they were convicted. State v. Worthington, — N.C. App. —, 352 S.E.2d 695 (1987).

Plea Agreement Regarding Rendering of Assistance. — If alleged plea agreement to the effect that if defendant testified against his supplier, his sentence would run concurrently with his previous sentence existed and was proper, the actual assistance rendered by the defendant would have to be measured by the terms of the agreement and not by the "substantial assistance" standard of this section. State v. Mercer, — N.C. App. —, 353 S.E.2d 682 (1987).

For case in which disclosure of the identity of State's confidential informant was held essential to a fair determination of defendant's case, see State v. Johnson, 81 N.C. App. 454, 344 S.E.2d 318, cert. denied, 317 N.C. 339, 346 S.E.2d 151 (1986).

Evidence of Other Drug Violations. —

Where evidence of defendant's bad character related in part to his activities in the illegal drug trade, it bore a reasonable relationship to the purposes of sentencing for offenses under this section by demonstrating his increased culpability and was a proper aggravating factor. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Intent to Sell as Aggravating Factor. — Intent to sell is not an element of manufacturing, transporting, or possessing 28 grams or more of heroin, the reason a person possesses, manufactures, or transports the heroin being irrelevant; therefore, the trial judge properly found as an aggravating factor that defendant had the specific intent to sell the heroin that he possessed. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Sentence Greater Than Presumptive Term. — In cases in which a statute mandates that an offender be punished as a felon of one of the classifications of § 15A-1340.4(f), but sets a minimum sentence greater than the presumptive sentence established for the appropriate class of felony therein, the minimum sentence set out in the criminal statute becomes the presumptive sentence for purposes of sentencing under the Fair Sentencing Act. Therefore, in order to impose a sentence in excess of the minimum prescribed by paragraph (h)(4)c of this section (45 years and $500,000), it is necessary that the trial judge make proper findings of factors in aggravation and mitigation and find that the aggravating factors outweigh any mitigating factors. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Applied in State v. Ruiz, 77 N.C. App. 425, 335 S.E.2d 32 (1985); State v. Diaz, 78 N.C. App. 488, 337 S.E.2d 147 (1985); State v. Damon, 78 N.C. App. 421, 337 S.E.2d 170 (1985); State v. Stallings, 316 N.C. 535, 342 S.E.2d 519 (1986).

Cited in State v. Norman, 76 N.C. App. 623, 334 S.E.2d 247 (1985); State v. Seagroves, 78 N.C. App. 49, 336 S.E.2d 684 (1985); State v. Sessoms, 79 N.C. App. 444, 339 S.E.2d 458 (1986); State v. Thomas, 81 N.C. App. 200, 343 S.E.2d 588 (1986); Tarantino v. North Carolina, 639 F. Supp. 661 (W.D.N.C. 1986); State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986); State v. Tarantino, 83 N.C. App. 473, 350 S.E.2d 864 (1986).

II. MANUFACTURE.

When Intent to Distribute, etc. —

In those cases where production, propagation, conversion or processing of a controlled substance are involved, the intent of the defendant, either to distribute or consume personally, will be irrelevant and does not form an element of the offense. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

Intent to distribute is not a necessary element of the offense of manufacturing a controlled substance unless the manufacturing activity is preparation or compounding. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

Possession of controlled substance with intent to manufacture it is separate and distinct offense from possession of such substance with the intent to transfer it. State v. Johnson, 78 N.C. App. 68, 337 S.E.2d 81 (1985).

Evidence Sufficient, etc. —

Evidence held ample to give rise to a reasonable inference that defendant manufactured heroin by packing controlled substance. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

III. SALE OR DELIVERY.

Sale and delivery of narcotics are separate offenses. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied, 316 N.C. 557, 344 S.E.2d 15 (1986).

Indictment for sale and/or delivery of a controlled substance must name the person to whom the defendant allegedly

sold or delivered. State v. Pulliam, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

Verdict finding that defendant "feloniously did sell or deliver" cocaine was fatally defective and ambiguous. State v. McLamb, 313 N.C. 572, 330 S.E.2d 476 (1985).

Verdict in disjunctive for "sale or delivery" of LSD was ambiguous and fatally defective, and would require a new trial. State v. Pulliam, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

IV. POSSESSION.

A. In General.

Types of Possession. —

In accord with main volume. See State v. Weldon, 314 N.C. 701, 333 S.E.2d 701 (1985); State v. Anderson, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

Mere presence in a room where drugs are located does not itself support an inference of constructive possession. State v. James, 81 N.C. App. 91, 344 S.E.2d 77 (1986).

Possession may be in a single individual or in combination with another. State v. Anderson, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

Elements of Felonious Possession. — Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be knowingly possessed. State v. Weldon, 314 N.C. 701, 333 S.E.2d 701 (1985).

Establishing Possession. —

In accord with first paragraph in main volume. See State v. Weldon, 314 N.C. 701, 333 S.E.2d 701 (1985); State v. Anderson, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

In accord with second paragraph in main volume. See State v. Weldon, 314 N.C. 701, 333 S.E.2d 701 (1985).

In accord with third paragraph in main volume. See State v. Weldon, 314 N.C. 701, 333 S.E.2d 701 (1985).

In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of constructive possession is sufficient, and that possession need not always be exclusive. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Evidence Insufficient. —

Where the only incriminating circumstance going beyond defendant's presence in room where cocaine was found was the fact that he had a gun in his hand and was "sneaking around" when police raided the house, this single circumstance was insufficient to establish constructive possession of the cocaine. Likewise, the evidence was insufficient for the charge to be considered by the jury on an acting in concert theory. State v. James, 81 N.C. App. 91, 344 S.E.2d 77 (1986).

Evidence Sufficient. —

Evidence that defendants were found at house in which marijuana was found, that their fingerprints were found on items within the house, that one defendant had in his possession a key that fit the gate and the door to the house and that his truck, which was present on the premises, contained twine identical to the twine used to tie marijuana plants to stakes and to twine found within the house, and that the other defendant admitted that he looked after the place was sufficient to permit the jury to find that each of the defendants had constructive possession of the marijuana. State v. Moore, 79 N.C. App. 666, 340 S.E.2d 771, cert. granted on limited issues, 316 N.C. 737, 344 S.E.2d 15, 317 N.C. 712, 347 S.E.2d 449 (1986).

When the State offered evidence that there was a large quantity of marijuana in house, over which defendants had constructive possession, and there was a field of marijuana 1,400 feet down a path from the house, the jury could conclude that the defendants controlled the field and were bringing marijuana from the field to the house. State v. Moore, 79 N.C. App. 666, 340 S.E.2d 771, cert. granted on limited issues, 316 N.C. 737, 344 S.E.2d 15, 317 N.C. 712, 347 S.E.2d 449 (1986).

Evidence of defendant's control of apartment where heroin and implements of manufacturing of heroin were found, when considered with evidence of transportation of 82.9 grams of heroin mixture, was ample evidence of such actual and constructive possession as to support a reasonable inference that defendant had the power and intent to control the disposition and use of the contraband and that he possessed and transported heroin in violation of subsection (h)(4)(c) of this section. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Evidence held sufficient to show that defendant was constructively in possession of marijuana being grown and dried in barn on property near his residence, so as to support his conviction for manu-

facturing same. State v. Beaver, 317 N.C. 643, 346 S.E.2d 476 (1986).

Evidence held sufficient to show sufficient joint custody and access to the premises and other incriminating circumstances to allow the jury to consider defendant's constructive possession of heroin found in his sister's house, where defendant admitted to police officers that his clothes were on a mattress in one room of the house, where the officers also found a pay stub bearing his name, where he admitted staying over at the house occasionally to babysit for his sister's child, and where he had been seen there the day before, and was standing on the porch nearest the heroin when police arrived. State v. James, 81 N.C. App. 91, 344 S.E.2d 77 (1986).

Testimony of chemist held sufficient to permit the jury to decide whether defendant possessed a mixture of cocaine weighing 28 grams or more. State v. Worthington, — N.C. App. —, 352 S.E.2d 695 (1987).

Evidence which, viewed in the light most favorable to the State, was sufficient to establish that marijuana was found in the bedroom of a house belonging to defendants; that only the defendants and two small children were present in the house; and that the marijuana found there weighed 193 grams, or slightly under seven ounces, was sufficient to establish each of the elements of felonious possession of marijuana; that is: (i) knowing (ii) possession (iii) of over one and one-half ounces (iv) of marijuana. State v. Edwards, — N.C. App. —, 354 S.E.2d 344 (1987).

Commingling of Substances. — Where an officer conducting an investigation at the crime scene combined large quantity of white powder found in a sealed plastic bag in a soldering iron box in a stereo shelf located approximately a foot and a half from a glass table with a smaller portion of white powder lying on that table, it was for the jury to decide whether defendant possessed a mixture of cocaine weighing more than 200 but less than 400 grams. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied and appeal dismissed, 318 N.C. 701, 351 S.E.2d 759 (1987).

B. Possession with Intent to Sell or Deliver.

Elements of possession of LSD with intent to sell or deliver are (i) the unlawful (ii) possession (iii) of a controlled substance (iv) with the intent to sell or deliver it. State v. Pulliam, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

Verdict Form Upheld. — The verdict form finding the defendant guilty of possession with intent to sell or deliver cocaine was not fatally ambiguous. State v. McLamb, 313 N.C. 572, 330 S.E.2d 476 (1985).

Evidence Sufficient to Establish Intent. —

Evidence that the cocaine which was found, although of small quantity, was packaged in multiple envelopes of a type commonly used in the sale of drugs, that there were a large number of syringes in the house, as well as a large number of bags of heroin under the porch, and that defendant had brought the cocaine with him to the house, taken it away, and returned with it several hours later, despite the small amount and his admission that he used cocaine, along with evidence admitted without objection that the area where the house was located was frequented by drug dealers, sufficiently raised a jury question as to defendant's intent to distribute the cocaine as part of drug-related activities at the house. State v. James, 81 N.C. App. 91, 344 S.E.2d 77 (1986).

V. TRAFFICKING.

When Constructive Possession Need Not Be Shown. — When the State has established that a defendant was present while a trafficking offense occurred, and that he acted in concert with others to commit the offense pursuant to a common plan or purpose, it is not necessary to invoke the doctrine of constructive possession. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

Trafficking by possession and trafficking by manufacture are separate offenses under subsection (h) of this section; thus, convictions for both offenses do not violate the Double Jeopardy Clause of the U.S. Constitution. Sanderson v. Rice, 777 F.2d 902 (4th Cir. 1985), cert. denied, — U.S. —, 106 S. Ct. 1226, 89 L. Ed. 2d 336 (1986).

The court did not err in entering judgment and sentencing defendant for both trafficking by possession and trafficking by delivery based on the same transaction. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied, 316 N.C. 557, 344 S.E.2d 15 (1986).

Sale, manufacture, delivery, transportation and possession of 50 pounds or more of marijuana are

separate trafficking offenses for which a defendant may be separately convicted and punished. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

Defendant could properly be convicted and punished separately for trafficking in heroin by possessing 28 grams or more of heroin, trafficking in heroin by manufacturing 28 grams or more of heroin, and trafficking in heroin by transporting 28 grams or more of heroin, even when the contraband material in each separate offense was the same heroin. Thus the trial judge did not err in denying defendant's motion that he direct the State to elect between prosecuting defendant for trafficking in heroin and the offenses of possession, manufacturing and transporting heroin. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Amendment by Session Laws 1983, c. 294, s. 6, inserting "cocoa" into subdivision (h) (3) rather than "coca" appears to be a typographical error. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied, 316 N.C. 557, 344 S.E.2d 15 (1986).

Indictment Referring to "Cocoa" Rather than "Coca" Not Defective. — Indictment which alleged trafficking in "a compound obtained from cocoa leaves," which is not a controlled substance, was not so defective as to deprive the trial court of subject matter jurisdiction, where the trial evidence showed over 637 grams of a 35% cocaine mixture, as at no time could defendant realistically have thought that he was charged with trafficking in chocolate. State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985), cert. denied, 316 N.C. 557, 344 S.E.2d 15 (1986).

Legislature's use of the word "mixture" in subsection (h)(4) establishes that the total weight of dosage units of Dilaudid is sufficient basis to charge a suspect with trafficking. State v. Jones, — N.C. App. —, 354 S.E.2d 251 (1987).

Quantity of Mixture under Paragraph (h)(4)(a). — The evidence presented — that defendant possessed and sold six tinfoil packets to an undercover agent, which, when all their contents were dumped together, weighed 6.65 grams, with one measure of heroin to about 20 measures of sugar — was sufficient to support a conviction under paragraph (h)(4)a of this section, despite defendant's contention that all of the heroin could have been in just one packet, the contents of which weighed no more than one gram and a fraction. State v. Horton, 75 N.C. App. 632, 331 S.E.2d 215, cert. denied, 314 N.C. 672, 335 S.E.2d 497 (1985).

Subdivision (h)(5) is permissive, not mandatory, and defendant has no right to a lesser sentence even if he does provide what he believes to be substantial assistance. State v. Perkerol, 77 N.C. App. 292, 335 S.E.2d 60 (1985), cert. denied, 315 N.C. 595, 341 S.E.2d 36 (1986).

Language "has rendered such substantial assistance" in subdivision (h)(5) of this section commonsensically sets no time limit on when such assistance must be rendered. State v. Perkerol, 77 N.C. App. 292, 335 S.E.2d 60 (1985), cert. denied, 315 N.C. 595, 341 S.E.2d 36 (1986).

State's Acceptance of Defendant's Offer Not Prerequisite. — Subdivision (h)(5) of this section does not make the state's acceptance of a defendant's offer a prerequisite to finding substantial assistance. State v. Perkerol, 77 N.C. App. 292, 335 S.E.2d 60 (1985), cert. denied, 315 N.C. 595, 341 S.E.2d 36 (1986).

Visual Inspection with Chemical Testing of Random Sample. — The evidence was sufficient to convict defendant of trafficking by either possession or sale although only three of the 14 packets of powder involved were chemically analyzed, where the total weight of all 14 packets was in excess of six grams and a State Bureau of Investigation forensic chemist with over 14 years experience visually analyzed all packets in question, chemically tested a random sample, and testified that in his opinion the plastic packet "all contain[ed] similar material which would contain heroin." State v. Anderson, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

Inference of Contents from Testing of Part. — Trial court did not err by permitting the offenses of trafficking in heroin to be submitted to the jury, on grounds that there was no evidence that there was heroin mixture in each of 390 separate glassine packets contained in foil-wrapped package so as to raise a reasonable inference that defendant was guilty of trafficking, as an expert chemist may give his opinion as to the whole when only a part of the whole has been tested, and testimony of expert witness, when considered in conjunction with the State's evidence as to possession, manufacturing and transporting, was more than ample to support a reasonable in-

ference of trafficking and that defendant engaged in trafficking more than 28 grams of heroin. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

The quantity of the entire mixture containing cocaine may be sufficient to constitute a violation of subdivision (h)(3) of this section. State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

Evidence Relative to Other Occasions. — In a prosecution for trafficking in heroin, evidence of the discovery of other controlled substances on other occasions on defendant's premises was admissible to show her guilty knowledge. State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985).

Reputation of Defendant's House. — The trial court erred in admitting, at defendant's trial for trafficking in heroin, evidence that defendant's house had a reputation as a place where illegal drugs could be bought and sold. However, the error was not such as to warrant a new trial. State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985).

Evidence held sufficient to give rise to a reasonable inference that defendant and her co-defendants agreed between themselves to commit the unlawful act of trafficking in cocaine, even though defendant absconded with the money involved in the transaction and the crime of trafficking was never completed. State v. Lipford, 81 N.C. App. 464, 344 S.E.2d 307 (1986).

Evidence was sufficient to submit to the jury the issue of defendants' guilt of conspiracy to traffic in more than 200 grams of cocaine. State v. Worthington, — N.C. App. —, 352 S.E.2d 695 (1987).

Verdict in Disjunctive Held Ambiguous. — Conviction on the charge of "trafficking in heroin by selling and delivering," where the verdict form read "Guilty of trafficking . . . by selling or delivering in excess of four grams of a mixture containing heroin," could not stand, because use of the disjunctive "or" in the verdict form rendered the verdict inherently ambiguous and deprived defendant of the right to a unanimous verdict. State v. Anderson, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

By instructing the jury that it could find defendant guilty of trafficking in marijuana if it found that defendant knowingly possessed or knowingly transported 10,000 pounds or more of marijuana, the trial judge submitted two possible crimes to the jury, as the jury could find defendant guilty if it found that he committed either or both of the crimes submitted to it. Thus, the jury's verdict of guilty was fatally defective because it was ambiguous, depriving defendant of his constitutional right to be convicted by a unanimous jury. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

§ 90-95.3. Restitution to law-enforcement agencies for undercover purchases.

CASE NOTES

Restitution of Amount Paid by State Agent for Drug Purchase. — Where defendant was convicted of possession and delivery of cocaine, and the trial court offered him the option of serving a three-year active sentence or serving six months and paying $600.00 restitution, and where the amount ordered was patently relevant to the pecuniary injury inflicted upon the State by defendant's criminal activities, in that $600.00 was paid by an agent of the State for the purchase of cocaine, the restitution ordered was reasonably related to the rehabilitative objectives of probation, and the condition was reasonable and just under the circumstances of the case. State v. Stallings, 316 N.C. 535, 342 S.E.2d 519 (1986).

§ 90-98. Attempt and conspiracy; penalties.

CASE NOTES

Number of Agreements Dictates Number of Conspiracies. — The number of agreements, not the number of substantive crimes nor the number of overt acts, dictates the number of conspiracies. Sanderson v. Rice, 777 F.2d 902 (4th Cir. 1985), cert. denied, — U.S. —, 106 S. Ct. 1226, 89 L. Ed. 2d 336 (1986).

Where there existed only one plot or plan, scheme or conspiracy, covering both possessing marijuana and manufacturing marijuana, the defendant could only be sentenced for one count of conspiracy. Sanderson v. Rice, 777 F.2d 902 (4th Cir. 1985), cert. denied, — U.S. —, 106 S. Ct. 1226, 89 L. Ed. 2d 336 (1986).

Conspiracy to Sell or Deliver. — Although the sale and delivery of controlled substances are separate offenses, where indictment charged defendant with only one offense, namely, conspiracy to sell or deliver, i.e., transfer, cocaine, and it was clear by its verdict that the jury found the defendant guilty of this single offense, the verdict was sufficient to support the judgment. State v. McLamb, 313 N.C. 572, 330 S.E.2d 476 (1985).

Evidence Held to Support Conviction of Attempt. — Evidence that defendant was given a valid medical prescription entitling her to 10 Percocet tablets, a controlled substance under state law, and that she presented an altered prescription for 40 tablets, but that she obtained only one Percocet tablet while possessing the altered prescription, would not support a conviction under § 90-108(a)(10), but would only support a conviction for the attempt to obtain a controlled substance by fraud under this section. State v. McHenry, 83 N.C. App. 58, 348 S.E.2d 825 (1986).

§ 90-101. Annual registration to manufacture, etc., controlled substances generally; effect of registration; exceptions; waiver; inspection.

(i) A physician licensed by the Board of Medical Examiners pursuant to Article 1 of this Chapter may dispense or administer Dronabinol as scheduled in G.S. 90-90(e) only as an antiemetic agent in cancer chemotherapy. (1971, c. 919, s. 1; 1973, c. 1358, s. 12; 1977, c. 667, s. 3; c. 891, s. 4; 1979, c. 781; 1981, c. 51, s. 9; 1983, c. 375, s. 2; 1985, c. 439, s. 2; 1987, c. 412, s. 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 18, 1987, added subsection (i).

§ 90-108. Prohibited acts; penalties.

CASE NOTES

Constitutionality. — The distinction between "knowing" and "intentional" in this section is not unconstitutionally vague, because this section not only provides adequate warnings as to the conduct it prohibits, but it also gives sufficiently clear guidelines and definitions for judges and juries to interpret and administer it uniformly. State v. Locklear, — N.C. App. —, 353 S.E.2d 666 (1987).

Section 14-120 is distinguishable from subdivision (a)(10) of this section, as § 14-120 specifically states that the person violates the statute if he publishes or utters a forged instrument "knowing the same to be falsely forged or counterfeited," and no such language

appears in subdivision (a)(10). State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

Intentional Act. — A person acts intentionally if he desires to cause the consequences of his act or believes that the consequences are substantially certain to result. State v. Bright, 78 N.C. App. 239, 337 S.E.2d 87 (1985), cert. denied, 315 N.C. 591, 341 S.E.2d 31 (1986).

Knowledge of Activity. — A person knows of an activity if he is aware of a high probability of its existence. State v. Bright, 78 N.C. App. 239, 337 S.E.2d 87 (1985), cert. denied, 315 N.C. 591, 341 S.E.2d 31 (1986).

Knowledge that a prescription is false or forged is an essential element of the offense under subdivision (a)(10) of this section. State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

Maintaining Vehicle Known to Be Used in Drug Offenses. — Under this section, maintaining a vehicle with knowledge that it is resorted to by persons for the use, keeping or selling of controlled substances is a misdemeanor, and maintaining a vehicle with the intent that it be so used is a Class I felony. State v. Bright, 78 N.C. App. 239, 337 S.E.2d 87 (1985), cert. denied, 315 N.C. 591, 341 S.E.2d 31 (1986).

Indictment Held Sufficient. — Where indictment charging an offense under subdivision (a)(10) of this section alleged that the offense was done "intentionally" and used terms implying a specific intent to deceive, it did not need to specifically allege that the defendant presented the false prescription knowing it was false. State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

Evidence Held to Support Conviction for Attempt. — Evidence that defendant was given a valid medical prescription entitling her to 10 Percocet tablets, a controlled substance under state law, and that she presented an altered prescription for 40 tablets, but that she obtained only one Percocet tablet while possessing the altered prescription, would not support a conviction under subdivision (a)(10) of this section, but would only support a conviction for the attempt to obtain a controlled substance by fraud under § 90-98. State v. McHenry, 83 N.C. App. 58, 348 S.E.2d 825 (1986).

Cited in State v. Newcomb, 84 N.C. App. 92, 351 S.E.2d 565 (1987).

§ 90-112. Forfeitures.

CASE NOTES

Currency was not subject, etc. — Where there was no evidence showing that $5,900.00 in currency was acquired, used or intended for use in violation of subsection (a) of this section, except for the fact that defendant possessed a large quantity of cash at the time that he possessed a large quantity of narcotics, the court erred in ordering the forfeiture of such money under this section. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied and appeal dismissed, 318 N.C. 701, 351 S.E.2d 759 (1987).

Cited in State v. Reid, 76 N.C. App. 668, 334 S.E.2d 235 (1985).

§ 90-113.4A. Destroying hypodermic syringes and needles before discarding.

(a) It shall be unlawful for any firm, organization, corporation, hospital, or medical clinic, or their agents or employees to discard a hypodermic syringe or needle unless such instrument is unbroken and placed in an incinerator or in a hardwalled container and disposed of in a sanitary landfill. Provided, however, that any such instrument that is accidentally broken shall be disposed of in a like manner.

(b) This section shall not apply to the discarding of such instruments after personal use by individuals who are under the care of a physician.

(c) Further, this section shall not apply to the discarding of such instruments after the use for the treatment of livestock.

(d) Violation of this section shall be a general misdemeanor. (1977, c. 907, s. 1; 1987, c. 410, s. 1.)

Effect of Amendments. — The 1987 amendment, effective November 1, 1987, rewrote this section.

Article 5B.

Drug Paraphernalia.

§ 90-113.22. Possession of drug paraphernalia.

CASE NOTES

Cited in State v. Muncy, 79 N.C. App. 356, 339 S.E.2d 466 (1986); State v. Newcomb, 84 N.C. App. 92, 351 S.E.2d 565 (1987).

Article 6.

Optometry.

§ 90-114. Optometry defined.

OPINIONS OF ATTORNEY GENERAL

Post-operative care of cataract surgery patients falls within the definition of optometry when performed by a licensed optometrist, and does not constitute the unauthorized practice of medicine where there are no complications as a result of the surgery. See opinion of Attorney General to Mr. Bryant D. Paris, Jr., Executive Director, Board of Medical Examiners, 56 N.C.A.G. 5 (1986).

§ 90-117.4. Judicial powers; additional data for records.

CASE NOTES

Subpoena Power of Board. — This section clearly gives the board the power, in a proper case, to issue subpoenas requiring the attendance of persons and the production of papers and records. The subpoena authority of the board is limited to any hearing, investigation or proceeding conducted by it. Bullington v. North Carolina State Bd. of Exmrs., 79 N.C. App. 750, 340 S.E.2d 770 (1986).

The authority of the board to enforce its subpoena power necessarily must be decided on a case-by-case basis. Bullington v. North Carolina State Bd. of Exmrs., 79 N.C. App. 750, 340 S.E.2d 770 (1986).

§ 90-118.10. Annual renewal of licenses.

Since the laws of North Carolina now in force provided for the annual renewal of any license issued by the North Carolina State Board of Examiners in Optometry, it is hereby declared to be the policy of this State that all licenses heretofore issued by the North Carolina State Board of Examiners in Optometry, or hereafter issued by said Board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina State Board of Examiners in Optometry is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each optometrist engaged in the practice of optometry in North Carolina shall make application to the North Carolina State Board of Examiners in Optometry and receive from said Board, subject to the further provisions of this section and of this Article, a certificate of renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said Board from time to time may prescribe by regulation.

If the application for such renewal certificate, accompanied by the fee required by this Article, is not received by the Board before January 31 of each year, an additional fee of fifty dollars ($50.00) shall be charged for renewal certificate. If such application accompanied by the renewal fee is not received by the Board before March 31 of each year, every person thereafter continuing to practice optometry without having applied for a certificate of renewal shall be guilty of the unauthorized practice of optometry and shall be subject to the penalties prescribed by G.S. 90-118.11.

In issuing a certificate of renewal, the Board shall expressly state whether such person, otherwise licensed in the practice of optometry, has been certified to prescribe and use pharmaceutical agents. (1973, c. 800, s. 17; c. 1092, s. 1; 1977, c. 482, s. 3; 1987, c. 645, s. 3.)

Effect of Amendments. — The 1987 amendment, effective January 1, 1988, substituted "fifty dollars ($50.00)" for "ten dollars ($10.00)" in the fourth paragraph.

§ 90-122. Compensation and expenses of Board.

Each member of the North Carolina State Board of Examiners in Optometry shall receive as compensation for his services in the performance of his duties under this Article a sum not exceeding fifty dollars ($50.00) for each day actually engaged in the performance of the duties of his office, said per diem to be fixed by said Board, and all legitimate and necessary expenses incurred in attending meetings of the said Board.

The secretary-treasurer shall, as compensation for his services, both as secretary-treasurer of the Board and a member thereof, be allowed a reasonable annual salary to be fixed by the Board and shall, in addition thereto, receive all legitimate and necessary expenses incurred by him in attending meetings of the Board and in the discharge of the duties of his office.

All per diem allowances and all expenses paid as herein provided shall be paid upon voucher drawn by the secretary-treasurer of the Board who shall likewise draw voucher payable to himself for the salary fixed for him by the Board.

The Board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this Article, and employ such personnel as it may deem requisite to assist in carrying out the administrative functions required by this Article and by the Board. (1909, c. 444, s. 11; C.S., s. 6695; 1923, c. 42, s. 4; 1935, c. 63; 1959, c. 574; 1973, c. 800, s. 23; 1979, c. 771, s. 3; 1987, c. 645, s. 2.)

Effect of Amendments. — The 1987 amendment, effective January 1, 1988, substituted "fifty dollars ($50.00)" for "thirty-five dollars ($35.00)" in the first paragraph.

§ 90-123. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties of devolving upon the North Carolina State Board of Examiners in Optometry, said Board is hereby authorized to charge and collect fees established by its rules not exceeding the following:

(1) Each application for general optometry examination	$400.00
(2) Each general optometry license renewal, which fee shall be annually fixed by the Board, and not later than December 15 of each year written notice of the amount of the renewal fee shall be given to each optometrist licensed to practice in this State by mailing the notice to the last address of record with the Board of each such optometrist	250.00
(3) Each certificate of license to a resident optometrist desiring to change to another state or territory	200.00
(4) Each license issued to a practitioner of another state or territory to practice in this State	250.00
(5) Each license to resume practice issued to an optometrist who has retired from the practice of optometry or who has removed from and returned to this State	250.00
(6) Each application for registration as an optometric assistant or renewal thereof	50.00
(7) Each application for registration as an optometric technician or renewal thereof	50.00
(8) Each duplicate license or renewal thereof for each branch office	50.00

(1909, c. 444, s. 12; C.S., s. 6696; 1923, c. 42, s. 5; 1933, c. 492; 1937, c. 362, s. 1; 1959, c. 477; 1969, c. 624; 1973, c. 1092, s. 2; 1979, c. 771, ss. 1, 2; 1981, c. 909; 1987, c. 645, s. 1.)

Effect of Amendments. — The 1987 amendment, effective January 1, 1988, rewrote this section.

Article 8.

Chiropractic.

§ 90-143. (Effective July 1, 1993) Definitions of chiropractic; examinations; educational requirements.

Chiropractic is herein defined to be the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body. It shall be the duty of the North Carolina State Board of Chiropractic Examiners (hereinafter referred to as "Board") to examine for license to practice chiropractic every applicant who complies with the following provisions: He shall, before he is admitted to examination, furnish proof of good moral character and satisfy the Board that he has received a baccalaureate degree from a college or university accredited by a regional accreditation body recognized by the U.S. Department of Education. He shall exhibit a diploma or furnish proof of graduation from a chiropractic college accredited by the Council on Chiropractic Education or holding recognized candidate for accreditation status with the Council on Chiropractic Education or a college teaching chiropractic that, in the Board's opinion, meets the equivalent standards established by the Council on Chiropractic Education, requiring an attendance of not less than four academic years, and supplying such facilities for clinical and scientific instruction, as shall meet the approval of the Board. The examination shall include but not be limited to the following studies: neurology, chemistry, pathology, anatomy, histology, physiology, embryology, dermatology, diagnosis, microscopy, gynecology, hygiene, eye, ear, nose and throat, orthopody, diagnostic radiology, jurisprudence, palpation, nerve tracing, chiropractic philosophy, theory, teaching and practice of chiropractic. (1917, c. 73, s. 5; 1919, c. 148, ss. 1, 2, 5; C.S., s. 6715; 1933, c. 442, s. 1; 1937, c. 293, s. 1; 1963, c. 646, s. 2; 1967, c. 263, s. 3; 1977, c. 1109, s. 1; 1981, c. 766, s. 4; 1987, c. 304.)

For this section as in effect until July 1, 1993, see the main volume.

Effect of Amendments. — The 1987 amendment, effective July 1, 1993, substituted "has received a baccalaureate degree from a college or university accredited by a regional accreditation body recognized by the U.S. Department of Education" for "has completed two years of prechiropractic college education and received credits for a minimum of 60 semester hours" at the end of the second sentence.

§ 90-154. Grounds for professional discipline.

(b) The following are grounds for disciplinary action by the Board under subsection (a):

(1) Advertising services in a false or misleading manner;

(2) Conviction of a felony or of a crime involving moral turpitude;

(3) Addiction or severe dependency upon alcohol or other drugs which endangers the public by impairing a chiropractor's ability to practice safely;

§ 90-143 has a delayed effective date. See notes for date.

(4) Unethical conduct in the practice of the profession as defined in G.S. 90-154.2.
(5) Negligence or incompetence in the practice of chiropractic;
(6) Committing an act or acts constituting malpractice in the practice of chiropractic;
(7) Not rendering acceptable care in the practice of the profession as defined in G.S. 90-154.3.
(8) Engaging in a course of lewd or immoral conduct in connection with the delivery of chiropractic services to a patient;
(9) Committing a fraudulent act or acts or engaging in fraudulent conduct in connection with the delivery of or charging for chiropractic services;
(10) Offering to accept or accepting payment for services rendered by assignment from any third party payor after offering to accept or accepting whatever the third party payor covers as payment in full, if the effect of the offering or acceptance is to eliminate or give the impression of eliminating the need of payment by an insured of any required deductions applicable in the insured's policy;
(11) Submitting to any third payor a claim for a service or treatment without also providing upon request a copy of the claim to the insured;
(12) Reducing or offering to reduce, rebating or offering to rebate, discounting or offering to discount to an insured any payment, by the insured's third party payor to the licensee, for services or treatments rendered under the insured's policy;
(13) Advertising any reduced or discounted fees for services or treatments or advertising any free services or treatments without prominently stating in the advertisement the licensee's usual fee for the service or treatment which is the subject of the discount, rebate, or free offering;
(14) Submitting to any third party payor a claim for a service or treatment at a greater or an inflated fee or charge than the usual fee the licensee charges for that service or treatment when the service or treatment is rendered without third party reimbursement;
(15) Advertising a fee or charge for a service or treatment which is different from the fee or charge the licensee submits to third party payors for that service or treatment;
(16) Violating the provisions of G.S. 90-154.1. (1917, c. 73, s. 14; C.S., s. 6725; 1949, c. 785, s. 3; 1963, c. 646, s. 3; 1981, c. 766, s. 7; 1983 (Reg. Sess., 1984), c. 1067, s. 1; 1985, c. 367, ss. 1, 2; c. 760, ss. 2, 3.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (b) of § 90-154 is set out above to correct the internal references in subdivisions (b)(4) and (b)(7).

CASE NOTES

The phrase "unethical conduct" in this section constitutes a sufficiently definite standard so that the Board of Chiropractic Examiners may set policies within it without exercising a legislative function. Farlow v. North Carolina State Bd. of Chiropractic Exmrs., 76 N.C. App. 202, 332 S.E.2d 696, cert. denied and appeal dismissed, 314 N.C. 664, 336 S.E.2d 621, — N.C. —, 337 S.E.2d 582 (1985).

Prescription of Unnecessary Course of Conduct. — "Unethical conduct," which this section authorizes the Board of Chiropractic Examiners to penalize, includes "dishonorable conduct" in prescribing a course of treatment for patients which is not justified by the injuries they have received but is done to inflate insurance claims. Farlow v. North Carolina State Bd. of Chiropractic Exmrs., 76 N.C. App. 202, 332 S.E.2d 696, cert. denied and appeal dismissed, 314 N.C. 664, 336 S.E.2d 621, — N.C. —, 337 S.E.2d 582 (1985).

§ 90-154.1. Collection of certain fees prohibited.

(a) Any patient or any other person responsible for payment has the right to refuse to pay, cancel payment, or be reimbursed for payment for any service, examination, or treatment other than the advertised reduced rate service, examination or treatment which is performed as a result of and within 72 hours of responding to any advertisement for a free or reduced rate service, free or reduced rate examination, or free or reduced rate treatment.

(b) In any written advertisement for a free or reduced rate service, free or reduced rate examination, or free or reduced rate treatment by a chiropractor, the language of subsection (a) shall appear in capital letters clearly distinguishable from the rest of the text, and any further treatment shall be agreed upon in writing and signed by both parties.

(c) In any broadcast advertisement for a free or reduced rate service, free or reduced rate examination, or free or reduced rate treatment by a chiropractor, the following shall be read at the end of the advertisement: "By law, any person who responds to this advertisement for a free or reduced rate service, examination or treatment and is billed for any service, examination, or treatment other than the advertised reduced rate service during the responding visit may refuse to pay, cancel payment, or be reimbursed for any payment made for the billed service, examination, or treatment."

(d) Any bill sent to a patient or any other person responsible for payment as a result of the patient responding to a chiropractic advertisement shall clearly contain the language of subsection (a) and have distinguished such on its face the charge for the reduced rate services, including an itemization of free services, and the separate charge for any services, examinations or treatments other than the advertised free or reduced rate services, examinations, or treatments. The reduced rate charges shall be labeled "Free or Reduced Rate Charges" and any other charges shall be labeled "Non-advertised Services, Examinations, or Treatments". (1985, c. 367, s. 3; 1987, c. 733.)

Effect of Amendments. — The 1987 amendment, effective August 6, 1987, inserted "other than the advertised reduced rate service, examination or treatment" in subsection (a), substituted "a free or reduced rate service, free or reduced examination, or free or reduced rate treatment" for "a free service, free examination, or free treatment and is referred to in the advertisement" at the end of subsection (a), inserted "or reduced rate" in three places and inserted "and" preceding "any further treatment shall be agreed upon" in subsection (b), rewrote subsection (c), and added subsection (d).

Article 9A.

Nursing Practice Act.

§ 90-171.19. Legislative findings.

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

§ 90-171.20. Definitions.

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

§ 90-171.21. Board of Nursing; composition; selection; vacancies; qualifications; term of office; compensation.

(g) Reimbursement. — Board members are entitled to receive compensation and reimbursement as authorized by G.S. 93B-5, provided that Board members may receive a per diem not to exceed fifty dollars ($50.00) per day for each day during which they are engaged in the official business of the Board. (1981, c. 360, s. 1; c. 852, s. 1; 1987, c. 651, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective July 21, 1987, added the proviso at the end of subsection (g).

§ 90-171.27. Expenses payable from fees collected by Board.

(b) The schedule of fees shall not exceed the following rates:

Application for examination leading to certificate and license as registered nurse	$45.00
Application for certificate and license as registered nurse by endorsement	75.00
Application for each re-examination leading to certificate and license as registered nurse	45.00
Renewal of license to practice as registered nurse (two-year period)	50.00
Reinstatement of lapsed license to practice as a registered nurse and renewal fee	90.00
Application for examination leading to certificate and license as licensed practical nurse by examination	45.00
Application for certificate and license as licensed practical nurse by endorsement	75.00
Application for each re-examination leading to certificate and license as licensed practical nurse	45.00
Renewal of license to practice as a licensed practical nurse (two-year period)	50.00

Reinstatement of lapsed license to practice as a licensed practical nurse and renewal fee 90.00

Reasonable charge for duplication services and materials.

(c) No refund of fees will be made.

(d) The Board may assess costs of disciplinary action against a nurse found in violation of the North Carolina Nursing Practice Act. (1947, c. 1091, s. 1; 1953, c. 750; c. 1199, ss. 1, 4; 1955, c. 1266, ss. 2, 3; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1971, c. 534; 1981, c. 360, s. 1; 1981, c. 661; 1987, c. 651, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective July 21, 1987, in subsection (b) increased the fee for application for certificate and license as registered nurse by endorsement from $45 to $75, for renewal of license to practice as registered nurse (two-year period) from $25 to $50, for reinstatement of lapsed license to practice as a registered nurse and renewal fee from $50 to $90, for application for certificate and license as licensed practical nurse by endorsement from $45 to $75, for renewal of license to practice as a licensed practical nurse (two-year period) from $25 to $50 and for reinstatement of lapsed license to practice as a licensed practical nurse and renewal fee from $50 to $90, and added subsection (d).

§ 90-171.37. Revocation, suspension, or denial of licensure.

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

Article 10A.

Practice of Midwifery.

§ 90-178.1. Title.

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

§ 90-178.6. Denial, revocation or suspension of approval.

Legal Periodicals. — For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

Article 12A.

Podiatrists.

§ 90-202.2. "Podiatry" defined.

CASE NOTES

Cited in Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278 (4th Cir. 1986).

Article 13A.

Practice of Funeral Service.

§ 90-210.18. Construction of Article; State Board; members; election; qualifications; term; vacancies.

(c) Nominations and elections of members of the North Carolina State Board of Mortuary Science shall be as follows:

(1) An election shall be held each year to elect two persons for membership on the Board of Mortuary Science, each to take office on the first day of January following the election. If in any year the election of a member of the Board is not completed by January 1, the member elected that year shall take office immediately after completion of the election.

(2) Every embalmer, funeral director and funeral service licensee with a current North Carolina license shall be eligible to vote in all elections. The holding of such a license to practice in North Carolina shall constitute registration to vote in such elections. The list of licensed embalmers, funeral directors and funeral service licensees shall constitute the registration list for elections.

(3) All elections shall be conducted by the State Board of Mortuary Science which is hereby constituted a Board of Mortuary Science Elections. If a member of the State Board of Mortuary Science whose position is to be filled at any election is nominated to succeed himself and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Mortuary Science Elections for that election and the remaining members of the Board of Mortuary Science Elections shall proceed and function without his participation.

(4) Nomination of candidates for election shall be made to the Board of Mortuary Science Elections by a written petition signed by not less than 20 embalmers, funeral directors or funeral service licensees licensed to practice in North Carolina, and filed with said Board of Mortuary Science Elections subsequent to the fifteenth day of May of the year in which the election is to be held and not later than midnight of the fifteenth day of August of such year, or not later than such earlier date (not before July 1) as may be set by the Board of Mortuary Science Elections: Provided,

that not less than 10 days' notice of such earlier date shall be given to all embalmers, funeral directors and funeral service licensees qualified to sign a petition of nomination.

(5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Mortuary Science Elections or its designated secretary at any time prior to the closing of the polls in any election.

(5a) Repealed by Session Laws 1983, c. 69, s. 3, effective March 14, 1983.

(6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Mortuary Science Elections shall prescribe, ballots containing identification of the seats for election and, in alphabetical order, the names of all nominees for each seat. Each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Mortuary Science Elections at such time as may be fixed by the Board of Mortuary Science Elections a ballot and a return official envelope addressed to said Board shall be mailed to each embalmer, funeral director and funeral service licensee licensed to practice in North Carolina, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope .....
Signature of Voter .....
Address of Voter .....
.....

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)." The Board of Mortuary Science Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election unless within the time hereinafter provided it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Mortuary Science Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Mortuary Science Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed embalmer, funeral director or funeral service licensee may be present. The counting of ballots shall be conducted as follows: The

envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: Provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of ballots shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9) a. Election shall be determined by a majority of the votes cast. As used in this subdivision "category I" refers to the seat held by a funeral service licensee or a person holding both a funeral director's license and an embalmer's license, and "category II" refers to the seat held by a funeral director or a funeral service licensee. A majority shall be determined:

1. In an election to fill one seat in category I and one seat in category II, and if there are two or more candidates for a category, the majority shall be determined by dividing the total vote cast for all candidates in the category by two. An excess of the sum so ascertained shall be a majority.
2. In an election to fill two seats in the same category, and if there are more than two candidates, the majority shall be determined by dividing the total vote cast for all candidates by two and by dividing the result by two. Any excess of the sum so ascertained shall be a majority. If more than two candidates obtain a majority the two having the highest vote shall be declared elected.

b. If there is a failure to obtain a majority of the votes cast for any seat the following procedures shall apply:

1. In an election to fill one seat in category I and one seat in category II, and if no candidate receives a majority in a category, the candidate receiving the highest number of votes in that category shall be declared elected unless the candidate receiving the second highest number of votes, within 10 days of having been notified by the Board of the vote total, shall request a second election. In the second election, the names of the candidates who

received the highest and the next highest number of votes shall appear on the ballot.

2. In an election to fill two seats in the same category, and if no candidate receives a majority, the two candidates receiving the highest number of votes shall be declared elected unless the candidate receiving the next highest number of votes, within 10 days of having been notified by the Board of the vote total, shall request a second election. In the second election the names of the two candidates who received the highest number of votes in the first election and the name of the candidate who received the next highest number of votes shall appear on the ballot, and the two candidates who receive the highest number of votes in the second election shall be declared elected. If in the first election only one candidate fails to receive a majority, the candidate receiving the highest number of votes, but not a majority, shall be declared elected unless the candidate receiving the next highest number of votes, within 10 days of having been notified by the Board of the vote total, shall request a second election. In the second election the name of the candidate who received the highest number of votes, but not a majority, in the first election and the name of the candidate who received the next highest number of votes shall appear on the ballot, and the candidate who receives the higher number of votes in the second election shall be declared elected.

c. In any election if there is a tie between candidates the tie shall be resolved by a vote of the Board, provided that if a member of the Board is one of the candidates in the tie he may not participate in such vote.

(10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements.

(11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations, because of lack of plural or proper nominations, or death, or withdrawal, or disqualification or any other reason, there shall be (i) only one candidate for a position, he shall be declared elected by the Board of Mortuary Science Elections, or (ii) no candidate for a position, the position shall be filled by the State Board of Mortuary Science. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected shall be filled by the State Board of Mortuary Science. In the event of the death or resignation of a member of the State Board of Mortuary Science, after taking office, his position shall be filled for the unexpired term by the State Board of Mortuary Science.

(12) An official list of all licensed embalmers, funeral directors and funeral service licensees shall be kept at an office of the Board of Mortuary Science Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed embalmer, funeral director or funeral service licensee. As soon as the voting in any election begins, a list of the licensed embalmers, funeral directors, and funeral service licensees shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned.

(13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Mortuary Science Elections for a period of six months following the close of an election.

(14) From any decision of the Board of Mortuary Science Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150B of the General Statutes of North Carolina.

(15) The Board of Mortuary Science Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed embalmers, funeral directors, and funeral service licensees.

(1901, c. 338, ss. 1-3; Rev., s. 4384; C.S., s. 6777; 1931, c. 174; 1945, c. 98, s. 1; 1949, c. 951, s. 1; 1957, c. 1240, s. 1; 1965, c. 630, s. 1; 1973, c. 476, s. 128; 1975, c. 571; 1979, c. 461, ss. 1-4; 1983, c. 69, ss. 1-4; 1987, c. 430, s. 1; c. 827, s. 1; c. 879, s. 6.2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. —

Session Laws 1987, c. 430, s. 16, as amended by Session Laws 1987, c. 879, s. 6.2, makes ss. 1 through 14 of c. 430 effective January 1, 1988.

Effect of Amendments. — Session Laws 1987, c. 430, s. 1, effective January 1, 1988, rewrote subdivision (c)(9).

Session Laws 1987, c. 827, s. 1, effective August 13, 1987, substituted reference to Chapter 150B for reference to Chapter 150A in subdivision (c)(14).

§ 90-210.20. Definitions.

(c1) "Dead human bodies", as used in this Article includes fetuses beyond the second trimester and the ashes from cremated bodies.

(e1) "Funeral chapel" means a chapel or other facility sesparate from the funeral establishment premises for the reposing of dead human bodies, visitation or funeral ceremony, which is owned, operated, or maintained by a funeral establishment, and which does not use the word "funeral" in its name, on a sign, in a directory, in advertising or in any other manner; in which or on the premises of which there is not displayed or offered for sale any caskets or other funeral merchandise; in which or on the premises of which there is not located any funeral business office or a preparation room; in which or on the premises of which no funeral sales, financing, or arrangements are made; and which no owner, operator, employee, or agent thereof represents the chapel to be a funeral establishment.

(1957, c. 1240, s. 2; 1975, c. 571; 1979, c. 461, s. 6; 1987, c. 430, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective January 1, 1988, added subdivisions (c1) and (e1).

Editor's Note. — Session Laws 1987, c. 430, s. 16, as amended by Session Laws 1987, c. 879, s. 6.2, makes ss. 1 through 14 of c. 430 effective January 1, 1988.

§ 90-210.21: Repealed by Session Laws 1987, c. 430, s. 3, effective January 1, 1988.

Editor's Note. — Session Laws 1987, c. 430, s. 16, as amended by Session Laws 1987, c. 879, s. 6.2, makes ss. 1 through 14 of c. 430 effective January 1, 1988.

§ 90-210.25. Licensing.

(a) Qualifications, Examinations, Resident Traineeship and Licensure. —

(1) To be licensed for the practice of funeral directing under this Article, a person must:
   a. Be at least 18 years of age,
   b. Be of good moral character,
   c. Have completed a minimum of 32 semester hours or 48 quarter hours of instruction in a course of study including the subjects set out in items e.1. and 2. of this subsection in a mortuary science college approved by the Board, or be a graduate of a mortuary science college approved by the Board.
   d. Have completed 12 months of resident traineeship as funeral director, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and
   e. Have passed an oral or written funeral director examination on the following subjects:
      1. Basic health sciences, including microbiology, hygiene, and public health,
      2. Funeral service administration, including accounting, psychology, funeral principles and directing, and
      3. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(2) To be licensed for the practice of embalming under this Article, a person must:
   a. Be at least 18 years of age,
   b. Be of good moral character,
   c. Be a graduate of a mortuary science college approved by the Board,
   d. Have completed 12 months of resident traineeship as an embalmer pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after

satisfying the educational requirement under item c. of this subsection, and

e. Have passed an oral or written embalmer examination on the following subjects:

1. Basic health sciences, including anatomy, chemistry, microbiology, pathology and forensic pathology,
2. Funeral service sciences, including embalming and restorative art, and
3. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(3) To be licensed for the practice of funeral service under this Article, a person must:

a. Be at least 18 years of age,
b. Be of good moral character,
c. Be a graduate of a mortuary science college approved by the Board,
d. Have completed 12 months of resident traineeship as a funeral service licensee, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and
e. Have passed an oral or written funeral service examination on the following subjects:

1. Basic health sciences, including anatomy, chemistry, microbiology, pathology, forensic pathology hygiene and public health,
2. Funeral service sciences, including embalming and restorative art,
3. Funeral service administration, including accounting, psychology, funeral principles and directing, and
4. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(4) a. A person desiring to become a resident trainee shall apply to the Board on a form provided by the Board. The application shall state that the applicant is not less than 18 years of age, of good moral character, and is the graduate of a high school or the equivalent thereof, and shall indicate the licensee under whom the applicant expects to train. A person training to become an embalmer may serve under either a licensed embalmer or a funeral service licensee. A person training to become a funeral director may serve under either a licensed funeral director or a funeral service licensee. A person training to become a funeral service licensee shall serve under a funeral service licensee. The application must be sustained by oath of the applicant and be accompanied by the appropriate fee. When the Board is satisfied as to the qualifications of an applicant it shall instruct the secretary to issue a certificate of resident traineeship.

b. When a resident trainee leaves the proctorship of the licensee under whom the trainee has worked, the licensee shall file with the Board an affidavit showing the length of time served with the licensee by the trainee, and the affidavit shall be made a matter of record in the Board's office. The licensee shall deliver a copy of the affidavit to the trainee.

c. A person who has not completed the traineeship and wishes to do so under a licensee other than the one whose name appears on the original certificate may reapply to the Board for approval, without payment of an additional fee.

d. A certificate of resident traineeship shall be signed by the resident trainee and upon payment of the renewal fee shall be renewable one year after the date of original registration; but the certificate may not be renewed more than one time. The Board shall mail to each registered trainee at his last known address a notice that the renewal fee is due and that, if not paid within 30 days of the notice, the certificate will be canceled. A penalty, in addition to the renewal fee, shall be charged for a late renewal, but the renewal of the registration of any resident trainee who is engaged in the active military service of the United States at the time renewal is due may, at the discretion of the Board, be held in abeyance for the duration of that service without penalties. No credit shall be allowed for the 12-month period of resident traineeship that shall have been completed more than three years preceding the examination for a license.

e. All registered resident trainees shall report to the Board at least every three months during traineeship upon forms provided by the Board listing the work which has been completed during the preceding three months of resident traineeship. The data contained in the reports shall be certified as correct by the licensee under whom the trainee has served during the period and by the licensed person who is managing the funeral service establishment. Each report shall list the following:

1. For funeral director trainees, the conduct of any funerals during the relevant time period,
2. For embalming trainees, the embalming of any bodies during the relevant time period,
3. For funeral service trainees, both of the activities named in 1 and 2 of this subsection, engaged in during the relevant time period.

f. To meet the resident traineeship requirements of G.S. 90-210.25(a)(1), G.S. 90-210.25(a)(2) and G.S. 90-210.25(a)(3) the following must be shown by the affidavit(s) of the licensee(s) under whom the trainee worked:

1. That the funeral director trainee has, under supervision, assisted in directing at least 25 funerals during the resident traineeship,

2. That the embalmer trainee has, under supervision, assisted in embalming at least 25 bodies during the resident traineeship,
3. That the funeral service trainee has, under supervision assisted in directing at least 25 funerals and, under supervision, assisted in embalming at least 25 bodies during the resident traineeship.

g. The Board may suspend or revoke a certificate of resident traineeship for violation of any provision of this Article.

h. Each sponsor for a registered resident trainee must during the period of sponsorship be actively employed with a funeral establishment. The traineeship shall be a primary vocation of the trainee.

i. Only one resident trainee may register and serve at any one time under any one person licensed under this Article.

j. The Board shall not register a resident trainee unless it is shown that the funeral establishment where he is to be employed had at least 35 funerals during the 12 months immediately preceding the date of the application.

k. The Board shall not register more than one resident trainee for each 150 funerals had by the funeral establishment during the 12 months immediately preceding the date of the application.

(5) The Board by regulation may recognize other examinations that the Board deems equivalent to its own.

All licenses shall be signed by the president and secretary of the Board and the seal of the Board affixed thereto. All licenses shall be issued, renewed or duplicated for a period not exceeding one year upon payment of the renewal fee, and all licenses, renewals or duplicates thereof shall expire and terminate the thirty-first day of December following the date of their issue unless sooner revoked and canceled; provided, that the date of expiration may be changed by unanimous consent of the Board and upon 90 days' written notice of such change to all persons licensed for the practice of funeral directing, embalming and funeral service in this State.

The holder of any license issued by the Board who shall fail to renew the same on or before January 31 of the calendar year for which the license is to be renewed shall have forfeited and surrendered the license as of that date. No license forfeited or surrendered pursuant to the preceding sentence shall be reinstated by the Board unless it is shown to the Board that the applicant has, throughout the period of forfeiture, engaged full time in another state of the United States or the District of Columbia in the practice to which his North Carolina license applies and has completed for each such year continuing education substantially equivalent in the opinion of the Board to that required of North Carolina licensees; or has completed in North Carolina a total number of hours of accredited continuing education computed by multiplying five times the number of years of forfeiture; or has passed the North Car-

olina examination for the forfeited license. No additional resident traineeship shall be required. The applicant shall be required to pay all delinquent annual renewal fees and a reinstatement fee. The Board may waive the provisions of this section for an applicant for a forfeiture which occurred during his service in the armed forces of the United States provided he applies within six months following severance therefrom.

All licensees now or hereafter licensed in North Carolina shall take courses of study in subjects relating to the practice of the profession for which they are licensed, to the end that new techniques, scientific and clinical advances, the achievements of research and the benefits of learning and reviewing skills will be utilized and applied to assure proper service to the public.

As a prerequisite to the annual renewal of a license, the licensee must complete, during the year immediately preceding renewal, at least five hours of continuing education courses, approved by the Board prior to enrollment; except that for renewals for calendar year 1980 the required length of study shall be a total of 15 hours in the three years immediately preceding January 1, 1980.

The Board shall not renew a license unless fulfillment of the continuing education requirement has been certified to it on a form provided by the Board, but the Board may waive this requirement for renewal in cases of certified illness or undue hardship or where the licensee lives outside of North Carolina and does not practice in North Carolina, and the Board shall waive the requirement for all licensees who have been licensed in North Carolina for a continuous period of 25 years or more.

The Board shall cause to be established and offered to the licensees, each calendar year, at least five hours of continuing education courses in subjects encompassing the license categories of embalming, funeral directing and funeral service. The Board may charge licensees attending these courses a reasonable registration fee in order to meet the expenses thereof and may also meet those expenses from other funds received under the provisions of this Article.

Any person who having been previously licensed by the Board as a funeral director or embalmer prior to July 1, 1975, shall not be required to satisfy the requirements herein for licensure as a funeral service licensee, but shall be entitled to have such license renewed upon making proper application therefor and upon payment of the renewal fee provided by the provisions of this Article. Persons previously licensed by the Board as a funeral director may engage in funeral directing, and persons previously licensed by the Board as an embalmer may engage in embalming. Any person having been previously licensed by the Board as both a funeral director and an embalmer may upon application therefor receive a license as a funeral service licensee.

(d) Establishment Permit.—

(1) No person, firm or corporation shall conduct, maintain, manage or operate a funeral establishment unless a permit for that establishment has been issued by the Board and is conspicuously displayed in the establishment. Each funeral establishment at a specific location shall be deemed to be a separate entity and shall require a separate permit and compliance with the requirements of this Article.

(2) A permit shall be issued when:

a. It is shown that the funeral establishment has in charge a person, known as a manager, licensed for the practice of funeral directing or funeral service, who shall not be permitted to manage more than one funeral establishment,

b. The Board receives a list of the names of all part-time and full-time licensees employed by the establishment,

c. It is shown that the funeral establishment satisfies the requirements of G.S. 90-210.27A, and

d. The Board receives payment of the permit fee.

(3) Applications for funeral establishment permits shall be made on forms provided by the Board and filed with the Board by the owner, a partner or an officer of the corporation by January 1 of each year, and shall be accompanied by the application fee or renewal fee, as the case may be. All permits shall expire on December 31 of each year.

A penalty for late renewal, in addition to the regular renewal fee, shall be charged for renewal of registration coming after the first day of February.

(4) The Board may suspend or revoke a permit when an owner, partner or officer of the funeral establishment violates any provision of this Article or any regulations of the Board, or when any agent or employee of the funeral establishment, with the consent of any person, firm or corporation operating the funeral establishment, violates any of those provisions, rules or regulations.

(5) Funeral establishment permits are not transferable. A new application for a permit shall be made to the Board within 30 days of a change of ownership of a funeral establishment.

(1901, c. 338, ss. 9, 10, 14; Rev., ss. 3644, 4388; 1917, c. 36; 1919, c. 88; C.S., ss. 6781, 6782; 1949, c. 951, s. 4; 1951, c. 413; 1957, c. 1240, ss. 2, 2½; 1965, cc. 719, 720; 1967, c. 691, s. 48; c. 1154, s. 2; 1969, c. 584, ss. 3, 3a, 4; 1975, c. 571; 1979, c. 461, ss. 11-21; 1981, c. 619, ss. 1-4; 1983, c. 69, s. 5; 1985, c. 242; 1987, c. 430, ss. 4-11; c. 879, s. 6.2.)

Editor's Note. —

Session Laws 1987, c. 430, s. 16, as amended by Session Laws 1987, c. 879, s. 6.2, makes ss. 1 through 14 of c. 430 effective January 1, 1988.

Session Laws 1987, c. 430, s. 14 provides: "Section 4 of this act [which rewrote paragraph (a)(1)c of this section] shall not affect persons who are, on the effective date of this act [Jan. 1, 1988], registered as resident trainees or students enrolled in a course of study pursuant to the requirements of G.S. 90-210.25(a)(1)c as those requirements existed before being amended by this act. Section 7 of this act [which added paragraphs (a)(4)j and (a)(4)k of this section] shall not affect persons who are, on the effective date of this act [Jan. 1, 1988], registered resident trainees, their employers or licensed sponsors. Section 10 [which amended paragraph (d)(2)a of

this section] and the first sentence of paragraph (a) and all of paragraphs (c), (d), (e), and (f) of Section 13 of this act [which added G.S. 90-210.27A] shall not affect funeral establishments which hold an establishment permit on the effective date of this act [Jan. 1, 1988]; provided, however, such exemptions shall not apply after the sale of a controlling interest in a funeral establishment."

Effect of Amendments. —

The 1987 amendment, effective January 1, 1988, substituted "instruction in a course of study including the subjects set out in items e.1. and 2. of this subsection in a mortuary science college approved by the Board" for "academic instruction in a duly accredited college or university" in paragraph (a)(1)c, inserted "accounting" in paragraph (a)(1)e 2, deleted a comma preceding "administration" and inserted "accounting" in paragraph (a)(3)e 3, added paragraphs (a)(4)j and (a)(4)k, rewrote the third paragraph of subdivision (a)(5), added the last sentence of subdivision (d)(1), added "who shall not be permitted to manage more than one funeral establishment" at the end of paragraph (d)(2)a, and rewrote subdivision (d)(2)c.

§ 90-210.27: Repealed by Session Laws 1987, c. 430, s. 12, effective January 1, 1988.

Editor's Note. — Session Laws 1987, c. 430, s. 16, as amended by Session Laws 1987, c. 879, s. 6.2, makes ss. 1 through 14 of c. 430 effective January 1, 1988.

§ 90-210.27A. Funeral establishments.

(a) Every funeral establishment shall contain a preparation room which is strictly private, of suitable size for the embalming of dead bodies. Each preparation room shall:

(1) Contain one standard type operating table;
(2) Contain facilities for adequate drainage;
(3) Contain a sanitary waste receptacle;
(4) Contain an instrument sterilizer;
(5) Have wall-to-wall floor covering of tile, concrete, or other material which can be easily cleaned;
(6) Be kept in sanitary condition and subject to inspection by the Board or its agents at all times;
(7) Have a placard or sign on the door indicating that the preparation room is private; and
(8) Have a proper ventilation or purification system to maintain a nonhazardous level of airborne contamination.

(b) No one is allowed in the preparation room while a dead human body is being prepared except licensees, resident trainees, public officials in the discharge of their duties, members of the medical profession, officials of the funeral home, next of kin, or other legally authorized persons.

(c) Every funeral establishment shall contain a reposing room for dead human bodies, of suitable size to accommodate a casket and visitors.

(d) No person who has been convicted of a felony shall:

(1) Own a funeral establishment if it is owned by a sole proprietorship;
(2) Be a partner in a funeral establishment if it is owned by a partnership;
(3) Be an officer, member of the board of directors or owner of twenty-five percent (25%) or more of the stock if it is owned by a corporation.

(e) If a funeral establishment is solely owned by a natural person, that person must be licensed by the Board as a funeral director or a funeral service licensee. If it is owned by a partnership, at least one partner must be licensed by the Board as a funeral director or a funeral service licensee. If it is owned by a corporation, the president, vice-president, or the chairman of the board of directors must be licensed by the Board as a funeral director or a funeral service licensee. The licensee required by this subsection must be actively engaged, on a day-to-day basis, in the operation of the funeral establishment.

(f) If a funeral establishment uses the name of a living person in the name under which it does business, that person must be licensed by the Board as a funeral director or a funeral service licensee.

(g) No funeral establishment shall own, operate, or maintain a funeral chapel without first having registered the name, location, and ownership thereof with the Board. (1987, c. 430, s. 13.)

Editor's Note. — Session Laws 1987, c. 430, s. 16, as amended by Session Laws 1987, c. 879, s. 6.2, makes this section effective January 1, 1988.

Session Laws 1987, c. 430, s. 14 provides: "Section 4 of this act [which rewrote G.S. 90-210.25(a)(1)c] shall not affect persons who are, on the effective date of this act [Jan. 1, 1988], registered as resident trainees or students enrolled in a course of study pursuant to the requirements of G.S. 90-210.25(a)(1)c as those requirements existed before being amended by this act. Section 7 of this act [which added G.S. 90-210.25(a)(4)j and (a)(4)k] shall not affect persons who are, on the effective date of this act [Jan. 1, 1988], registered resident trainees, their employers or licensed sponsors. Section 10 [which amended G.S. 90-210.25(d)(2)a] and the first sentence of paragraph (a) and all of paragraphs (c), (d), (e), and (f) of Section 13 of this act [which added this section] shall not affect funeral establishments which hold an establishment permit on the effective date of this act [Jan. 1, 1988]; provided, however, such exemptions shall not apply after the sale of a controlling interest in a funeral establishment."

§ 90-210.28. Fees.

The Board may set and collect fees, not to exceed the following amounts:

Establishment permit	
Application	$200.00
Annual renewal	100.00
Late renewal penalty	75.00
Courtesy card	
Application	75.00
Annual renewal	50.00
Out-of-state licensee	
Application	150.00
Embalmer, funeral director, funeral service	
Application — North Carolina-Resident	100.00
-Non-Resident	200.00
Annual Renewal-embalmer or funeral director	50.00
-funeral service	100.00
Reinstatement fee	50.00
Resident trainee permit	
Application	50.00
Annual renewal	35.00
Late renewal penalty	25.00

Duplicate license certificate 25.00
Chapel registration
Application 150.00
Annual renewal 100.00

The Board shall provide, without charge, one copy of the current statutes and regulations relating to Mortuary Science to every person applying for and paying the appropriate fees for licensing pursuant to this Article. The Board may charge all others requesting copies of the current statutes and regulations, and the licensees or applicants requesting additional copies, a fee equal to the costs of production and distribution of the requested documents. (1979, c. 461, s. 22; 1981, c. 619, s. 5; 1985, c. 447, ss. 1, 2; 1987, c. 710.)

Effect of Amendments. —
The 1987 amendment, effective July 31, 1987, rewrote this section.

Article 13B.

Funeral and Burial Trust Funds.

§ 90-210.31. Deposit of trust funds.

(d1) This Article does not apply to pre-need burial contracts or pre-arrangements for funeral services or merchandise funded, at the direction of the purchaser, with the proceeds of any insurance policy regulated by Chapter 58 of the General Statutes.

(1969, c. 187, s. 2; 1981 (Reg. Sess., 1982), c. 1336, s. 1; 1983, c. 657, ss. 2, 4; 1985, c. 12, ss. 1-3; 1987, c. 430, s. 15.)

Editor's Note. — Session Laws 1987, c. 430, s. 16, as amended by Session Laws 1987, c. 879, s. 6.2, makes ss. 1 through 14 of c. 430 effective January 1, 1988, and further provides that s. 15 of c. 430 (which added subsection (d1) of this section) is effective upon ratification and shall expire on July 1, 1989. Chapter 430 was ratified June 19, 1987.

Effect of Amendments. —
The 1987 amendment, effective June 19, 1987, added subsection (d1).

Article 16.

Dental Hygiene Act.

§ 90-232. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules and regulations not exceeding the following:

(1) Each applicant for examination $125.00
(2) Each renewal certificate, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dental hygienist licensed to practice in this State by mail-

ing such notice to the last address of record with the Board of each such dental hygienist 60.00
(3) Each restoration of license 60.00
(4) Each provisional license 60.00
(5) Each certificate of license to a resident dental hygienist desiring to change to another state or territory 25.00

All fees shall be payable in advance to the Board and shall be disposed of by the Board in the discharge of its duties under this Article. (1945, c. 639, s. 11; 1965, c. 163, s. 7; 1967, c. 489, s. 2; 1971, c. 756, s. 12; 1987, c. 555, s. 2.)

Effect of Amendments. — The 1987 amendment, effective July 6, 1987, rewrote subdivisions (1) through (5).

Article 18A.

Practicing Psychologists.

§ 90-270.11. Licensing and examination.

(a) Practicing Psychologist. —

(1) The Board shall issue a license to practice psychology to any applicant who pays an application fee of fifty dollars ($50.00) and an additional examination fee of not more than two hundred dollars ($200.00), who passes a satisfactory examination in psychology, and who submits evidence verified by oath and satisfactory to the Board that he:

a. Is at least 18 years of age;

b. Is of good moral character;

c. Has received a doctoral degree based on a planned and directed program of studies in psychology from an accredited educational institution; and subsequent to receiving a doctoral degree has had at least two years of acceptable and appropriate supervised experience germane to his/her area of practice as a psychologist. The Board shall adopt rules and regulations implementing and defining these provisions, including but not limited to such factors as residence in the program, internship and related field experiences, numbers of course credits, course content, numbers and qualifications of faculty, and program identification and identity.

d. Has not within the preceding six months failed an examination given by the Board.

(2) In order for a psychological associate to be upgraded to a practicing psychologist, the applicant must comply with the requirements set forth in subdivision (1) hereof and shall pay an examination fee of not more than two hundred dollars ($200.00).

(b) Psychological Associate. —

(1) The Board shall issue a license to practice psychology to any applicant who pays an application fee of fifty dollars ($50.00) and an additional examination fee of not more

than two hundred dollars ($200.00), who passes a satisfactory examination in psychology, and who submits evidence verified by oath and satisfactory to the Board that he:

a. Is at least 18 years of age;
b. Is of good moral character;
c. Has received a master's degree in psychology from an accredited educational institution;
d. Has not within the preceding six months failed an examination given by the Board.

(2) The Board shall not prescribe any educational requirements other than a master's degree in psychology for the initial license issued under this section, but may impose continuing education requirements for renewals of the license.

(c) Examinations. — The examinations required by subsections (a) and (b) of this section shall be of a form and content prescribed by the Board, and may be oral, written, or both. The examinations shall be administered annually, or more frequently as the Board may prescribe, at a time and place to be determined by the Board.

(d) Foreign Graduates. — Applicants trained in institutions outside the United States, applying for licensure at either the practicing psychologist or psychological associate level, must show satisfactory evidence of training and degrees equivalent to those required of applicants trained within the United States, pursuant to Board rules and regulations. (1967, c. 910, s. 11; 1971, c. 889, ss. 2, 3; 1975, c. 675, ss. 1, 2; 1977, c. 670, s. 7; 1979, c. 670, ss. 5, 6; 1979, 2nd Sess., c. 1176; 1981, c. 738, ss. 1, 2; 1983, c. 37, ss. 1, 2; c. 82, s. 4; 1985, c. 734, s. 7; 1987, c. 326, ss. 1, 2; c. 500, s. 1.)

Editor's Note. — Session Laws 1987, c. 326, which rewrote paragraph (a)(1)c and added subsection (d), provides in s. 3: "This act shall become effective on July 1, 1987, except that applicants applying for licensure as practicing psychologists on or before July 1, 1993, who receive their degrees after July 1, 1987, and who were enrolled in doctoral training programs on or before December 31, 1987, and applicants applying for licensure as practicing psychologists on or before July 1, 1989, shall be evaluated according to statutory provisions and Board rules and regulations in effect on June 30, 1987."

Effect of Amendments. — Session Laws 1987, c. 326, ss. 1 and 2, rewrote paragraph (a)(1)c, which formerly read "Has received his doctoral degree based on a planned and directed program of studies, the content of which was psychological in nature, from an accredited educational institution; and subsequent to receiving his doctoral degree has had at least two years of acceptable and appropriate supervised experience germane to his area of practice as a psychologist," and added subsection (d). For the effective date of this amendment, see the Editor's Note above.

Session Laws 1987, c. 500, s. 1, effective June 29, 1987, substituted "two hundred dollars ($200.00)" for "one hundred fifty dollars ($150.00)" in the introductory language of subdivisions (a)(1) and (b)(1), substituted "and shall pay an examination fee of not more than two hundred dollars ($200.00)" for "however, a not more than one hundred fifty dollars ($150.00) examination fee only shall be required" at the end of subdivision (a)(2), and substituted "other than a master's degree in psychology for the initial license issued under this section, but may impose continuing education requirements for renewals of the license" for "other than the master's degree in psychology required by this subsection" at the end of subdivision (b)(2).

§ 90-270.14. Renewal of licenses.

A license issued under this Article must be renewed annually on or before the first day of January, the requirements for such renewal being:

(2) The Board may establish requirements for continuing education for psychologists licensed and registered in this State. (1967, c. 910, s. 14; 1971, c. 889, s. 1; 1975, c. 675, s. 3; 1979, c. 710; 1985, c. 734, s. 8; 1987, c. 500, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 29, 1987, substituted "requirements" for "recommendations" in subdivision (2).

§ 90-270.16. Prohibited acts.

CASE NOTES

Unwittingly Employing Unlicensed Psychologist. — Provision in insurance contract between plaintiff psychologist and defendant insurer that the policy did not apply to any criminal, fraudulent or malicious act or omission of the insured, along with subsection (c) of this section and § 90-270.17, making it a misdemeanor for a psychologist to employ another psychologist who does not possess a valid license, created an insurmountable bar to plaintiff's claim for reimbursement of moneys refunded by him to the Department of Human Resources for services rendered by unlicensed psychologist employed by him, and his asserted lack of knowledge that the psychologist in question was not licensed was not relevant, as there is no such requirement of knowledge explicit or implicit in this section. Swisher v. American Home Assurance Co., 80 N.C. App. 718, 343 S.E.2d 288, cert. denied and appeal dismissed, 318 N.C. 420, 349 S.E.2d 606 (1986).

§ 90-270.17. Violations and penalties.

CASE NOTES

Unwittingly Employing Unlicensed Psychologist. — Provision in insurance contract between plaintiff psychologist and defendant insurer that the policy did not apply to any criminal, fraudulent or malicious act or omission of the insured, along with § 90-270.16(c) and this section, making it a misdemeanor for a psychologist to employ another psychologist who does not possess a valid license, created an insurmountable bar to plaintiff's claim for reimbursement of moneys refunded by him to the Department of Human Resources for services rendered by unlicensed psychologist employed by him, and his asserted lack of knowledge that the psychologist in question was not licensed was not relevant, as there is no such requirement of knowledge explicit or implicit in § 90-270.16. Swisher v. American Home Assurance Co., 80 N.C. App. 718, 343 S.E.2d 288, cert. denied and appeal dismissed, 318 N.C. 420, 349 S.E.2d 606 (1986).

Article 18B.

Physical Therapy.

§ 90-270.26. Powers of the Board.

The Board shall have the following general powers and duties:

(1) Examine and determine the qualifications and fitness of applicants for a license to practice physical therapy in this State;

(2) Issue, renew, deny, suspend, or revoke licenses to practice physical therapy in this State, or reprimand or otherwise discipline licensed physical therapists and physical therapist assistants;

(3) Conduct investigations for the purpose of determining whether violations of this Article or grounds for disciplining licensed physical therapists or physical therapist assistants exist;

(4) Employ such professional, clerical or special personnel necessary to carry out the provisions of this Article, and may purchase or rent necessary office space, equipment and supplies;

(5) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a "contested case" as defined in G.S. 150B-2(2) arises under this Article;

(6) Appoint from its own membership one or more members to act as representatives of the Board at any meeting where such representation is deemed desirable;

(7) Establish reasonable fees for applications for examination, certificates of licensure and renewal, and other services provided by the Board;

(8) Adopt, amend, or repeal any rules or regulations necessary to carry out the purposes of this Article and the duties and responsibilities of the Board.

The powers and duties enumerated above are granted for the purpose of enabling the Board to safeguard the public health, safety and welfare against unqualified or incompetent practitioners of physical therapy, and are to be liberally construed to accomplish this objective. In instances where the Board makes a decision to discipline physical therapists or physical therapist assistants under powers set out by any of subsections (2) through (5) of this section, it may as part of its decision charge the reasonable costs of investigation and hearing to the person disciplined. (1979, c. 487; 1985, c. 701, s. 1; 1987, c. 827, ss. 1, 77.)

Effect of Amendments. — Session Laws 1987, c. 827, s. 1, effective August 13, 1987, substituted reference to Chapter 150B for reference to Chapter 150A in subdivision (5).

Session Laws 1987, c. 827, s. 77, effective August 13, 1987, deleted "Article 3 of" preceding "Chapter 150B" in subdivision (5).

Article 18C.

Marital and Family Therapy Certification Act.

§ 90-270.46. Policy and purpose.

Legal Periodicals. — For note suggesting the need for a new tort of breach of confidence, in light of Watts v. Cumberland County Hospital System, 75 N.C. App. 1, 330 S.E.2d 242 (1985), see 8 Campbell L. Rev. 145 (1985).

§ 90-270.51. Board meetings.

(b) The Board may adopt rules to implement this Article. (1979, c. 697, s. 1; 1987, c. 827, s. 78.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, rewrote subsection (b).

Article 18D.

Occupational Therapy.

§ 90-270.69. Powers and duties of the Board.

The Board shall have the following powers and duties:

(7) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a "contested case" as defined in G.S. 150B-2(2) arises under this Article;

(1983 (Reg. Sess., 1984), c. 1073, s. 1; 1987, c. 827, ss. 1, 77.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — Session Laws 1987, c. 827, s. 1, effective August 13, 1987, substituted reference to Chapter 150B for reference to Chapter 150A in subdivision (7).

Session Laws 1987, c. 827, s. 77, effective August 13, 1987, deleted "Article 3 of" preceding "Chapter 150B" in subdivision (7).

Article 20.

Nursing Home Administrator Act.

§ 90-278. Qualifications for licensure.

The Board shall have authority to issue licenses to qualified persons as nursing home administrators, and shall establish qualification criteria for such nursing home administrators.

(1) A license as a nursing home administrator shall be issued to any person upon the Board's determination that:

a. He is at least 18 years of age, of good moral character and of sound physical and mental health; and

b. He has successfully completed the equivalent of two years of college level study (60 semester hours or 96 quarter hours) from an accredited community college,

college or university prior to application for licensure; or

has completed a combination of education and experience, acceptable under rules promulgated by the Board, prior to application for licensure. Under this provision, two years of supervisory experience in a nursing home shall be equated to one year of college study; and

c. He has satisfactorily completed a course prescribed by the Board, which course contains instruction on the services provided by nursing homes, laws governing nursing homes, protection of patient interests and nursing home administration; and

d. He has successfully completed his training period as an administrator-in-training as prescribed by the Board or has professional experience the Board declares is comparable to a period of training as an administrator; and

e. He has passed examinations administered by the Board and designed to test for competence in the subject matters referred to in paragraph c of this subdivision.

(1969, c. 843, s. 1; 1973, c. 476, s. 128; 1981, c. 722, ss. 5-7; 1981 (Reg. Sess., 1982), c. 1234, s. 2; 1983, c. 737; 1987, c. 492, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1987, c. 492, s. 2 provides:

"Notwithstanding G.S. 150B-13, the State Board of Examiners for Nursing Home Administrators may, until six months from the effective date of this act, adopt temporary rules to implement this act without prior notice or hearing or upon any abbreviated notice or hearing the Board finds practicable. The Board shall begin normal rule-making procedures on permanent rules in accordance with Article 2 of Chapter 150B of the General Statutes at the same time it adopts a temporary rule. Temporary rules adopted under this section shall be published in the North Carolina Register and shall be effective for a period of not longer than 180 days."

Effect of Amendments. — The 1987 amendment, effective June 26, 1987, inserted "or has professional experience the Board declares is comparable to a period of training as an administrator" in paragraph (1)d.

Article 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

§ 90-292. Declaration of policy.

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

Practice of Audiology Where Certified Only in Pathology Not Permitted. — The General Assembly did not intend for one certified by the Department of Public Instruction in speech and language pathology to practice audiology, as the hearing impaired child would not be receiving the highest possible quality audiological services. It would thus defeat the Legislature's intent if

one licensed in one field only were allowed to practice in the other field. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-293. Definitions.

As used in this Article, unless the context otherwise requires:

(1) "Audiologist" means any person who engages in the practice of audiology. A person is deemed to be an audiologist if he offers services to the public under any title incorporating the terms of "audiology," "audiologist," "audiological," "hearing clinic," "hearing clinician," "hearing therapist," or any similar title or description of service.

(6) "The practice of audiology" means the application of principles, methods, and procedures of measurement, testing, evaluation, prediction, consultation, counseling, instruction, habilitation, or rehabilitation related to hearing and disorders of hearing for the purpose of identifying, preventing, ameliorating, or modifying such disorders and conditions in individuals and/or groups of individuals. For the purpose of this subdivision, the words "habilitation" and "rehabilitation" shall include auditory training, speech reading, hearing aid use evaluation and recommendations, and fabrication of earmolds and similar accessories for clinical testing purposes only.

(8) Repealed by Session Laws 1987, c. 665, s. 1, effective October 1, 1987.

(9) "Accredited college or university" means an institution of higher learning accredited by the Southern Association of Colleges and Universities, or accredited by a similarly recognized association of another locale. (1975, c. 773, s. 1; 1987, c. 665, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, deleted a proviso at the end of the second sentence of subdivision (1), which read "provided, however, that a person licensed under Chapter 93D of the General Statutes may use the term 'National Hearing Aid Society, Certified, Hearing Aid Audiologist' except in public representations, advertising and telephone directory listings"; deleted a former second sentence of subdivision (6), which read "A person licensed under this Article may not engage in the dispensing, fitting and selling of hearing aids unless that person is also licensed under Chapter 93D of the General Statutes"; deleted former subdivision (8), defining "Unethical conduct"; and added subdivision (9).

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-294. License required; Article not applicable to certain activities.

(a) Licensure shall be granted in either speech and language pathology or audiology independently. A person may be licensed in both areas if qualified in both areas.

(b) No person may practice or hold himself out as being able to practice speech and language pathology or audiology in this State unless such person holds a current, unsuspended, unrevoked license issued by the Board as provided in this Article. The license required by this section shall be kept conspicuously posted in such person's office or place of business at all times. Nothing in this Article, however, shall be construed to prevent a qualified person licensed in this State under any other law from engaging in the profession or occupation for which such person is licensed.

(c) The provisions of this Article do not apply to:

(1) The activities, services and use of an official title by a person employed by an agency of the federal government and solely in connection with such employment.

(2) The activities and services of a student or trainee in speech and language pathology or audiology pursuing a course of study in an accredited college or university, or working in a training center program approved by the Board, if these activities and services constitute a part of such person's course of study.

(3) Repealed by Session Laws 1987, c. 665, s. 2, effective October 1, 1987.

(4) A person who holds a valid and current credential as a speech and language pathologist or audiologist issued by the North Carolina Department of Public Instruction or who is employed by the North Carolina Schools for the Deaf and Blind, if such person practices speech and language pathology or audiology in a salaried position solely within the confines or under the jurisdiction of the Department of Public Instruction or the Department of Human Resources respectively.

(5) A physician licensed to practice medicine.

(6) Persons performing audiometric screenings and whose work is under the supervision of a licensed physician, or licensed audiologist.

(7) Persons who are now or may become engaged in counseling or instructing laryngectomees in the methods, techniques, or problems of learning to speak again.

(8) Individuals licensed under G.S. 93D.

(1975, c. 773, s. 1; 1977, c. 692, s. 3; 1981, c. 572, ss. 1, 2; 1987, c. 665, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "if qualified in both areas" for "if he is qualified" at the end of the second sentence of subsection (a), deleted "or hold a current, unsuspended, unrevoked license of endorsement pursuant to G.S. 90-297" at the end of the first sentence of subsection (b), inserted "or occupation" in the third sentence of subsection (b), deleted "except that an individual is not exempt from this Article who does work as a speech and language pathologist or audiologist outside the scope of such employment for which a fee may be paid directly or indirectly to such person by or for the recipient of

the service" at the end of subdivision (c)(1), deleted subdivision (c)(3), relating to the activities and services of a person who has recently become a resident of the State while his application for licensing is pending, and added subdivisions (c)(5) through (c)(8).

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

Practice of Audiology Where Certified Only in Pathology Not Permitted. — The General Assembly did not intend for one certified by the Department of Public Instruction in speech and language pathology to practice audiology, as the hearing impaired child would not be receiving the highest possible quality audiological services. It would thus defeat the Legislature's intent if one licensed in one field only were allowed to practice in the other field. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-295. Qualifications of applicants for permanent licensure.

To be eligible for permanent licensure by the Board as a speech and language pathologist or audiologist, the applicant must:

(4) Present written evidence from a licensed and/or American Speech and Hearing Association certified speech and language pathologist or audiologist supervisor of nine months of full-time professional experience in which bona fide clinical work has been accomplished in the major professional area (speech and language pathology or audiology) in which the license is being sought. This experience must follow the completion of the requirements listed in subdivisions (1), (2) and (3). Full time is defined as at least nine months in a calendar year and a minimum of 30 hours per week. Half time is defined as at least 18 months in two calendar years and a minimum of 20 hours per week. The supervision must be performed by a person who holds a valid license under this Article, or certificate of clinical competence from the American Speech-Language-Hearing Association, in the specific area for which licensure is sought.

(5) Pass an examination established or approved by the Board. (1975, c. 773, s. 1; 1987, c. 665, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, inserted "permanent" preceding "licensure" in the catchline and in the introductory language of the section, added the last sentence of subdivision (4), and rewrote subdivision (5).

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-296. Examinations.

(a) An applicant for permanent licensure who has satisfied the academic requirements of G.S. 90-295, shall pass a written examination approved or established by the Board. A person who holds a temporary license during the supervised experience year must take and pass the examination required by the Board for permanent licensure before the end of the temporary license period.

(b) The Board shall administer or approve at least two examinations of the type described in subsection (a) of this section each year, and additional examinations as the volume of applications makes appropriate.

(c) An examination shall not be required as a prerequisite for a license for:

(1) A person who holds a certificate of clinical competence issued by the American Speech-Hearing-Language Association in the specialized area for which such person seeks licensure; or

(2) A person who has met the educational, practical experience, and examination requirements of another state or jurisdiction which has requirements equivalent to or higher than those in effect pursuant to this Article for the practice of audiology or speech pathology. (1975, c. 773, s. 1; 1981, c. 572, s. 3; 1987, c. 665, s. 4.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

§ 90-297: Repealed by Session Laws 1987, c. 665, s. 5, effective October 1, 1987.

§ 90-298. Qualifications for applicants for temporary licensure.

(a) To be eligible for temporary licensure an applicant must:

(1) Meet the academic and clinical practicum requirements of G.S. 90-295(1), (2), and (3); and

(2) Submit a plan of supervised experience complying with the provisions of G.S. 90-295(4); and

(3) Pay the temporary license fee required by G.S. 90-305(5).

(b) A temporary license is required when an applicant has not completed the required supervised experience and passed the required examination. A person who holds a temporary license during the supervised experience year must take and pass the examination required by the Board for permanent licensure before the end of the temporary license period.

(c) A temporary license issued under this section shall be valid only during the period of supervised experience required by G.S. 90-295(4), and shall not be renewed. (1975, c. 773, s. 1; 1987, c. 665, s. 6.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

CASE NOTES

Cited in North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-299. Licensee to notify Board of place of practice.

CASE NOTES

Cited in North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-301. Grounds for suspension or revocation of license.

Any person licensed under this Article may have his license revoked or suspended for a fixed period by the Board under the provisions of North Carolina General Statutes, Chapter 150B, for any of the following causes:

(3) Unethical conduct as defined in this Article or in a code of ethics adopted by the Board.

(5) Failure to exercise a reasonable degree of professional skill and care in the delivery of professional services.

(6) Any violation of the provisions of this Article. (1975, c. 773, s. 1; 1981, c. 572, s. 4; 1987, c. 665, s. 7; c. 827, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — Session Laws 1987, c. 665, s. 7, effective October 1, 1987, rewrote subdivision (3), which formerly related to unprofessional conduct, rewrote subdivision (5), which formerly read "Any violation of provisions of this Article," and added subdivision (6).

Session Laws 1987, c. 827, s. 1, effective August 13, 1987, substituted reference to Chapter 150B for reference to Chapter 150A in the introductory paragraph.

§ 90-301A. Unethical acts and practices.

Unethical acts and practices shall be defined as including:

(1) Obtaining or attempting to obtain any fee by fraud or misrepresentation.

(2) Employing directly or indirectly any suspended or unlicensed person to perform any work covered by this Article.

(3) Using, or causing or promoting the use of any advertising matter, promotional literature, testimonial, guarantee, warranty, label, brand, insignia, or any other representation, however disseminated or published, which is misleading, deceiving, improbable, or untruthful.

(4) Aiding, abetting, or assisting any other person or entity in violating the provisions of this Article.

(5) Willfully harming any person in the course of the delivery of professional services licensed by this Article.

(6) Treating a person who cannot reasonably be expected to benefit from treatment.

(7) Charging a fee for treatment or services not rendered.
(8) Providing or attempting to provide services or supervision of services by persons not properly prepared or legally qualified to perform or permitting services to be provided by a person under such person's supervision who is not properly prepared or legally qualified to perform such services.
(9) Guaranteeing the result of any therapeutic or evaluation procedure. (1987, c. 665, s. 8.)

Editor's Note. — Session Laws 1987, c. 665, s. 13 makes this section effective October 1, 1987.

§ 90-302. Prohibited acts and practices.

No person, partnership, corporation, or other entity may:
(6) Aid, assist, abet, or direct any person licensed under this Article in violation of the provisions of this Article. (1975, c. 773, s. 1; 1987, c. 665, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, inserted "partnership, corporation, or other entity" in the introductory paragraph, and added subdivision (6).

CASE NOTES

Cited in North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-304. Powers and duties of Board.

(a) The powers and duties of the Board are as follows:
(1) To administer, coordinate, and enforce the provisions of this Article, establish fees, evaluate the qualifications of applicants, supervise the examination of applicants, and issue subpoenas, examine witnesses, and administer oaths, and investigate persons engaging in practices which violate the provisions of this Article.
(2) To conduct hearings and keep records and minutes as necessary to an orderly dispatch of business.
(3) To adopt responsible rules and regulations including but not limited to regulations which establish ethical standards of practice and to amend or repeal the same.
(4) To issue annually a list stating the names of persons currently licensed under the provisions of this Article.
(5) To employ such personnel as determined by its needs and budget.
(6) To adopt seals by which it shall authenticate their proceedings, copies of the proceedings, records and the acts of the Board, and licenses.
(7) To bring an action to restrain or enjoin violations of this Article in addition to and not in lieu of criminal prosecution or proceedings to revoke or suspend licenses issued under this Article.

(1975, c. 773, s. 1; 1981, c. 572, s. 7; 1987, c. 665, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added subdivision (a)(7).

§ 90-305. Fees.

Persons subject to licensure under this Article shall pay the following fees to the Board:

(1) Application fee	$30.00
(2) Examination fee	30.00
(3) Initial license fee	40.00
(4) Renewal license fee	40.00
(5) Temporary license	40.00
(6) Delinquency fee	25.00

(1975, c. 773, s. 1; 1987, c. 665, s. 11.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, inserted "fee" in subdivision (4) and increased the fees in subdivisions (1) and (2) from $25 to $30, in subdivisions (3) through (5) from $25 to $40, and in subdivision (6) from $10 to $25.

§ 90-306. Penalty for violation.

Any person, partnership, or corporation who or which willfully violates the provisions of this Article shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00), nor more than five hundred dollars ($500.00) or be imprisoned for a period not exceeding six months, or both, in the discretion of the Court. (1975, c. 773, s. 1; 1987, c. 665, s. 12.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

Chapter 90A.

Sanitarians and Water and Wastewater Treatment Facility Operators.

Article 2.

Certification of Water Treatment Facility Operators.

§ 90A-22. Classification of water treatment facilities; notification of users.

(b) The Board shall notify users of such facilities when any classification of a facility by the Board would result in a certified operator's not being required to supervise the operation of that facility. Any user so notified may demand a hearing on the Board's decision, and that hearing and any appeal therefrom shall be conducted in accordance with Articles 3 and 4 of Chapter 150B of the General Statutes. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1981, c. 616, s. 6; 1987, c. 827, ss. 1, 230.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — Session Laws 1987, c. 827, s. 1, effective August 13, 1987, substituted reference to Chapter 150B for reference to Chapter 150A in subsection (b).

Session Laws 1987, c. 827, s. 230, effective August 13, 1987, substituted "on the Board's" for "before the Board on its" in subsection (b).

§ 90A-30. Penalties; remedies; contested cases.

(b) Any person wishing to contest a penalty issued under this section shall be entitled to an administrative hearing and judicial review conducted according to the procedures outlined in Articles 3 and 4 of Chapter 150B of the General Statutes.

(1981, c. 616, s. 11; 1987, c. 827, s. 231.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, substituted "Articles 3 and 4 of Chapter 150B of the General Statutes" for "G.S. 150A-23 through G.S. 150A-52" in subsection (b).

Article 3.

Certification of Wastewater Treatment Plant Operators.

§ 90A-40. Issuance of certificates.

(b) A certificate may be issued in an appropriate grade without examination to any person who is properly registered on the "National Association of Boards of Certification" reciprocal registry who meets all other requirements of rules adopted under this Article.

(c) Repealed by Session Laws 1987, c. 582, s. 2, effective August 1, 1987.

(1969, c. 1059, s. 3; 1973, c. 476, s. 128; c. 1262, s. 23; 1979, c. 554, ss. 2-4; 1987, c. 582, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 1, 1987, rewrote subsection (b), and deleted subsection (c), relating to certificates issued without examination to certain operators holding certificates on July 1, 1969.

§ 90A-42. Fees.

The Wastewater Treatment Plant Operators Certification Commission, in establishing procedures for implementing the requirements of this Article, shall impose the following schedule of fees:

(1) Examination including Certificate, $25.00;
(2) Temporary Certificate, $35.00;
(3) Temporary Certification Renewal, $50.00;
(4) Conditional Certificate, $25.00;
(5) Repealed by Session Laws 1987, c. 582, s. 3, effective August 1, 1987.
(6) Reciprocity Certificate, $50.00;
(7) Annual Renewal, $15.00;
(8) Replacement of Certificate, $15.00;
(9) Late Payment of Annual Renewal, $15.00 penalty in addition to all current and past due fees; and
(10) Mailing List Charges — The Wastewater Treatment Plant Operators Certification Commission may provide mailing lists of certified wastewater treatment plant operators and of wastewater treatment plants to persons who request such lists. The charge for such lists shall be five dollars ($5.00) per 100 names of certified operators or treatment plants, with a minimum charge of fifty dollars ($50.00). (1969, c. 1059, s. 3; 1979, c. 554, s. 5; 1981, c. 361, ss. 1-4; 1987, c. 582, s. 3.)

Effect of Amendments. — The 1987 amendment, effective August 1, 1987, increased the fees in subdivision (1) from $15.00 to $25.00, in subdivision (2) from $25.00 to $35.00, in subdivision (6) from $25.00 to $50.00, and in subdivision (8) from $5.00 to $15.00, deleted subdivision (5), relating to a voluntary conversion certificate, substituted "Annual Renewal" for "Annual Fee" and increased the amount thereof from $5.00 to $15.00 in subdivision (7), rewrote subdivision (9), which read "Late Payment of Annual Fee, five dollars ($5.00), in addition to the regular fee called for in (7) hereinabove; and," and rewrote subdivision (10), which read "Mailing List Fees, upon request for mailing lists of wastewater treatment plant operators and/or plants, shall be made available upon payment of fees at a rate of five dollars ($5.00) per 100 names of certified operators and/or facilities, with a minimum payment of fifty dollars ($50.00)."

Article 4.

Registrations of Sanitarians.

§ 90A-50. State Board of Sanitarian Examiners.

CASE NOTES

Cited in King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986).

§ 90A-51. Definitions.

CASE NOTES

"Sanitarian". — Subdivision (4) of this section does not require that a person be engaged in a "broad range of environmental health functions." Rather, the statute plainly requires that in order to be certified as a registered sanitarian one must be "a public health professional qualified . . . to effectively plan, organize, manage, execute and evaluate one or more of the many diverse elements comprising the field of environmental health." King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986).

The Board's denial of petitioners' request for certification pursuant to § 90A-61(a) as registered sanitarians, based on its finding that they were not engaged in a broad range of environmental health functions on Oct. 1, 1982, was affected by an error of law, and would be reversed and remanded. King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986).

§ 90A-59. Record of proceedings; register of applications; register of registered sanitarians and sanitarian interns.

(1981 (Reg. Sess., 1982), c. 1274, s. 2; 1987, c. 282, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, only the catchline is set out.

Effect of Amendments. — The 1987 amendment, effective June 4, 1987, substituted "applications" for "application" in the catchline.

§ 90A-61. Certification and registration of persons practicing as sanitarians on October 1, 1982; temporary provisions.

CASE NOTES

Section 90A-51(4) does not require that a sanitarian be engaged in a "broad range of environmental health functions." Rather, the statute plainly requires that in order to be certified as a registered sanitarian one must be "a public health professional qualified . . . to effectively plan, organize, manage, execute and evaluate one or more of the many diverse elements comprising the field of environmental health." King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986).

Denial of Certification Held Error. — The Board's denial of petitioners' request for certification pursuant to subsection (a) of this section as registered sanitarians, based on its finding they were not engaged in a broad range of environmental health functions on Oct. 1, 1982, was affected by an error of law, and would be reversed and remanded. King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986).

Chapters 90C and 91.

Editor's Note. — The legislation and annotations affecting Chapters 90C and 91 have been included in recently published replacement chapters.

Chapter 93.

Public Accountants.

§ 93-1. Definitions; practice of law.

CASE NOTES

Promotion and Sale of Securities Not Covered by Accountant's Liability Coverage. — While certain "gray areas" exist, particularly with respect to tax law, where the professional services of accountants can become difficult to distinguish from other professional services, transactions which involved the promotion and sale of securities as a profit-making venture unrelated to taxes did not involve the practice of accounting, and insurer who had issued defendants an accountant's professional liability policy was not obligated to defend insureds in damage actions involving such transactions. Mastrom, Inc. v. Continental Cas. Co., 78 N.C. App. 483, 337 S.E.2d 162 (1985).

§ 93-12. Board of Certified Public Accountant Examiners.

The name of the State Board of Accountancy is hereby changed to State Board of Certified Public Accountant Examiners and said name State Board of Certified Public Accountant Examiners is hereby substituted for the name State Board of Accountancy wherever the latter name appears or is used in Chapter 93 of the General Statutes. Said Board is created as an agency of the State of North Carolina and shall consist of seven members to be appointed by the Governor, five persons to be holders of valid and unrevoked certificates as certified public accountants issued under the provisions of this Chapter and two persons who are not certified public accountants who shall represent the interest of the public at large. Members of the Board shall hold office for the term of three years and until their successors are appointed. Appointments to the Board shall be made under the provisions of this Chapter as and when the terms of the members of the present State Board of Accountancy expire; provided, that all future appointments to said Board shall be made for a term of three years expiring on the thirtieth day of June. All Board members serving on June 30, 1980, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1980, shall serve more than two complete consecutive terms. The powers and duties of the Board shall be as follows:

(5) To issue certificates of qualification admitting to practice as certified public accountants, each applicant who, having the qualifications herein specified, shall have passed an examination to the satisfaction of the Board, in "accounting theory," "accounting practice," "auditing," "business law," and other related subjects.

From and after July 1, 1961, any person shall be eligible to take the examination given by the Board, or to receive a

certificate of qualification to practice as a certified public accountant, who is a citizen of the United States or has declared his intention of becoming a citizen or is a resident alien, and has been domiciled in or resided for at least four months within the State of North Carolina immediately prior to the filing of an application to take the examination or to receive a certificate of qualification, is 18 years of age or over, and is of good moral character, and submits evidence satisfactory to the Board that:

a. He holds a bachelor's degree from a college or university accredited by one of the regional accrediting associations or from a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution, and
b. His degree studies included a concentration in accounting as defined by the Board or that he supplemented his degree studies with courses that the Board determines to be substantially equivalent to a concentration in accounting, and
c. Satisfactory evidence of the completion of two years in an accredited college or university or its equivalent with a concentration in accounting as defined by the Board and two years experience in the practice of public accountancy under the direct supervision of a certified public accountant, in addition to other experience requirements in this section, may be substituted for a bachelor's degree.

Provided, however, the Board may, in its discretion, waive the education requirement of any candidate if the Board is satisfied from the result of a special written examination given the candidate by the Board to test his educational qualifications that he is as well equipped, educationally, as if he met the education requirements specified above. The Board may provide by regulation for the general scope of such examinations and may obtain such advice and assistance as it deems appropriate to assist it in preparing, administering and grading such special examinations.

Such applicant, in addition to passing the examination given by the Board, shall have the endorsement as to his eligibility of three certified public accountants who currently hold licenses in any state or territory of the United States or the District of Columbia and shall have had either:

a. Two years experience in the field of accounting under the direct supervision of a certified public accountant who currently holds a valid license in any state or territory of the United States or the District of Columbia, or
b. Five years experience teaching accounting in a four-year college or university accredited by one of the regional accrediting associations or in a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution; or

c. Five years experience in the field of accounting; or five years experience teaching college transfer accounting courses at a community college or technical institute accredited by one of the regional accrediting associations; or

d. Any combination of such experience determined by the Board to be substantially equivalent to the foregoing.

A Master's or more advanced degree in accounting, tax law, economics, business administration, or the equivalent thereof, or a law degree with emphasis in taxation or accounting from an accredited college or university may be substituted for one year of experience. The Board may permit persons otherwise eligible to take its examinations and withhold certificates until such person shall have had the required experience.

(9) Adoption of Rules of Professional Conduct; Disciplinary Action. — The Board shall have the power to adopt rules of professional ethics and conduct to be observed by certified public accountants and public accountants in this State. The Board shall have the power to revoke, either permanently or for a specified period, any certificate issued under the provisions of this Chapter to a certified public accountant or public accountant or to censure the holder of any such certificate or to assess a civil penalty not to exceed one thousand dollars ($1,000) for any one or combination of the following causes:

a. Conviction of a felony under the laws of the United States or of any state of the United States.

b. Conviction of any crime, an essential element of which is dishonesty, deceit or fraud.

c. Fraud or deceit in obtaining a certificate as a certified public accountant.

d. Dishonesty, fraud or gross negligence in the public practice of accountancy.

e. Violation of any rule of professional ethics and professional conduct adopted by the Board.

Any disciplinary action taken shall be in accordance with the provisions of Chapter 150B of the General Statutes. Any civil penalty assessed under this section shall be collected by the Board and transferred to the State Treasurer for use in the General Fund.

(1925, c. 261, s. 11; 1939, c. 218, s. 1; 1951, c. 844, ss. 4-9; 1953, c. 1041, s. 20; 1959, c. 1188; 1961, c. 1010; 1971, c. 738, ss. 1-3; 1973, c. 476, s. 193; c. 1331, s. 3; 1975, c. 107; 1975, 2nd Sess., c. 983, s. 69; 1977, c. 804, ss. 1, 2; 1979, c. 750, ss. 6-10; 1979, 2nd Sess., c. 1087, ss. 1, 2; 1981, c. 10; 1983, c. 185, ss. 4-11; 1985, c. 149; 1987, c. 353; c. 827, ss. 1, 79.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — Session Laws 1987, c. 353, effective June 12, 1987, substituted "business administration, or the equivalent thereof, or a law degree with emphasis in taxation or accounting from an accredited college or university" for "or business administration from an accredited college or university" in the next-to-last sentence of subdivision (5).

Session Laws 1987, c. 827, s. 1, effective August 13, 1987 substituted reference to Chapter 150B for reference to Chapter 150A in subdivision (9).

Session Laws 1987, c. 827, s. 79, effec-

tive August 13, 1987, deleted a former second sentence of subdivision (9), which read "The rules so adopted shall be publicized and filed in the office of the Attorney General as provided by Chapter 150A."

Chapter 93A.

Real Estate License Law.

Article 1.

Real Estate Brokers and Salesmen.

§ 93A-1. License required of real estate brokers and real estate salesmen.

CASE NOTES

Quoted in Hayman v. Stafford, 77 N.C. App. 154, 334 S.E.2d 438 (1985).

§ 93A-2. Definitions and exceptions.

Legal Periodicals. —
For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Applied in Hayman v. Stafford, 77 N.C. App. 154, 334 S.E.2d 438 (1985).

§ 93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-5. Register of applicants; roster of brokers and salesmen; financial report to Secretary of State.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-6. Disciplinary action by Commission.

(a) The Commission shall have power to take disciplinary action. Upon its own motion, or on the verified complaint of any person, the Commission may investigate the actions of any person or entity licensed under this Chapter, or any other person or entity who shall assume to act in such capacity. If the Commission finds probable cause that a licensee has violated any of the provisions of this Chapter, the Commission may hold a hearing on the allegations of misconduct.

The Commission shall have power to suspend or revoke at any time a license issued under the provisions of this Chapter, or to reprimand or censure any licensee, if, following a hearing, the Commission adjudges the licensee to be guilty of:

(1) Making any willful or negligent misrepresentation or any willful or negligent omission of material fact;

(2) Making any false promises of a character likely to influence, persuade, or induce;

(3) Pursuing a course of misrepresentation or making of false promises through agents, salesmen, advertising or otherwise;

(4) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts;

(5) Accepting a commission or valuable consideration as a real estate salesman for the performance of any of the acts specified in this Chapter, from any person except the licensed broker by whom he is employed;

(6) Representing or attempting to represent a real estate broker other than the broker by whom he is engaged or associated, without the express knowledge and consent of the broker with whom he is associated;

(7) Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others;

(8) Being unworthy or incompetent to act as a real estate broker or salesman in a manner as to endanger the interest of the public;

(9) Paying a commission or valuable consideration to any person for acts or services performed in violation of this Chapter;
(10) Any other conduct which constitutes improper, fraudulent or dishonest dealing;
(11) Performing or undertaking to perform any legal service, as set forth in G.S. 84-2.1, or any other acts not specifically set forth in that section;
(12) Commingling the money or other property of his principals with his own or failure to maintain and deposit in a trust or escrow account in an insured bank or savings and loan association in North Carolina all money received by him as a real estate broker acting in that capacity, or an escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; provided, these accounts shall not bear interest unless the principals authorize in writing the deposit be made in an interest bearing account and also provide for the disbursement of the interest accrued;
(13) Failing to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy and sell real estate to the buyer and to the seller;
(14) Failing as a broker, at the time the transaction is consummated, to deliver to the seller in every real estate transaction, a complete detailed closing statement showing all of the receipts and disbursements handled by him for the seller or failing to deliver to the buyer a complete statement showing all money received in the transaction from the buyer and how and for what it was disbursed; or
(15) Violating any rule or regulation promulgated by the Commission.

The Executive Director shall transmit a certified copy of all final orders of the Commission suspending or revoking licenses issued under this Chapter to the clerk of superior court of the county in which the licensee maintains his principal place of business. The clerk shall enter these orders upon the judgment docket of the county.

(e) When a person or entity licensed under this Chapter is accused of any act, omission, or misconduct which would subject the licensee to disciplinary action, the licensee, with the consent and approval of the Commission, may surrender his or its license and all the rights and privileges pertaining to it for a period of time established by the Commission. A person or entity who surrenders his or its license shall not thereafter be eligible for or submit any application for licensure as a real estate broker or salesman during the period of license surrender. (1957, c. 744, s. 6; 1967, c. 281, s. 4; c. 853, s. 3; 1969, c. 191, s. 5; 1971, c. 86, s. 2; 1973, c. 1112; c. 1331, s. 3; 1975, c. 28; 1979, c. 616, ss. 6, 7; 1981, c. 682, s. 15; 1983, c. 81, s. 13; 1987, c. 516, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, deleted a former first sentence of the second paragraph of subsection (a), which read "All such hearings shall be conducted in accordance with the provisions of Chapter 150A of the General Statutes," and added subsection (e).

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer

Beware," see 8 Campbell L. Rev. 473 (1986).

Article 2.

Real Estate Recovery Fund.

§ 93A-16. Real Estate Recovery Fund created; payment to fund; management.

(a) There is hereby created a special fund to be known as the "Real Estate Recovery Fund" which shall be set aside and maintained by the North Carolina Real Estate Commission. Said fund shall be used in the manner provided under this Article for the payment of unsatisfied judgments where the aggrieved person has suffered a direct monetary loss by reason of certain acts committed by any real estate broker or salesman licensed under this Chapter.

(b) On September 1, 1979, the Commission shall transfer the sum of one hundred thousand dollars ($100,000) from its expense reserve fund to the Real Estate Recovery Fund. Thereafter, the Commission may transfer to the Real Estate Recovery Fund additional sums of money from whatever funds the Commission may have, provided that, if on December 31 of any year the amount remaining in the fund is less than fifty thousand dollars ($50,000), the Commission may determine that each person or entity licensed under this Chapter, when renewing his or its license, shall pay in addition to his license renewal fee, a fee not to exceed ten dollars ($10.00) per broker and five dollars ($5.00) per salesman as shall be determined by the Commission for the purpose of replenishing the fund.

(d) The Commission shall have the authority to adopt reasonable rules and procedures not inconsistent with the provisions of this Article, to provide for the orderly, fair and efficient administration and payment of monies held in the Real Estate Recovery Fund. (1979, c. 614, s. 1; 1983, c. 81, ss. 1, 2; 1987, c. 516, ss. 3-5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

Session Laws 1987, c. 516, s. 5, effective June 30, 1987, rewrote the second sentence of subsection (b), relating to replenishing the fund.

Session Laws 1987, c. 516, ss. 3 and 4, effective October 1, 1987, substituted "real estate broker or salesman licensed" for "persons licensed" in subsection (a) and added subsection (d).

§ 93A-17. Grounds for payment; notice and application to Commission.

(a) An aggrieved person who has suffered a direct monetary loss by reason of the conversion of trust funds by a real estate broker or salesman licensed under this Chapter shall be eligible to recover, subject to the limitations of this Article, the amount of trust funds converted and which is otherwise unrecoverable provided that:

(1) The act or acts of conversion which form the basis of the claim for recovery occurred on or after September 1, 1979;

(2) The aggrieved person has sued the real estate broker or salesman in a court of competent jurisdiction and has filed

with the Commission written notice of such lawsuit within 60 days after its commencement unless the claim against the Real Estate Recovery Fund is for an amount less than one thousand five hundred dollars ($1,500), excluding attorneys fees, in which case the notice may be filed within 60 days after the termination of all judicial proceedings including appeals;

(3) The aggrieved person has obtained final judgment in a court of competent jurisdiction against the real estate broker or salesman on grounds of conversion of trust funds arising out of a transaction which occurred when such broker or salesman was licensed and acting in a capacity for which a license is required; and

(4) Execution of the judgment has been attempted and has been returned unsatisfied in whole or in part.

Upon the termination of all judicial proceedings including appeals, and for a period of one year thereafter, a person eligible for recovery may file a verified application with the Commission for payment out of the Real Estate Recovery Fund of the amount remaining unpaid upon the judgment which represents the actual and direct loss sustained by reason of conversion of trust funds. A copy of the judgment and return of execution shall be attached to the application and filed with the Commission. The applicant shall serve upon the judgment debtor a copy of the application and shall file with the Commission an affidavit or certificate of such service.

(b) For the purposes of this Article, the term "trust funds" shall include all earnest money deposits, down payments, sales proceeds, tenant security deposits, undisbursed rents and other such monies which belong to another or others and are held by a real estate broker or salesman acting in that capacity. Trust funds shall also include all time share purchase monies which are required to be held in trust by G.S. 93A-45(c) during the time they are, in fact, so held. Trust funds shall not include, however, any funds held by an independent escrow agent under G.S. 93A-42 or any funds which the court may find to be subject to an implied, constructive or resulting trust.

(c) For the purposes of this Article, the terms "licensee", "broker", and "salesman" shall include only individual persons licensed under this Chapter as brokers and salesmen and shall not include a time share developer, time share project, independent escrow agent, corporation or other entity licensed under this Chapter. (1979, c. 614, s. 1; 1983, c. 81, ss. 2, 14; 1987, c. 516, s. 6.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

§ 93A-18. Hearing; required showing.

Upon such application by an aggrieved person, the Commission shall conduct a hearing and the aggrieved person shall be required to show:

(2) He is making application not more than one year after termination of all judicial proceedings, including appeals, in connection with the judgment;

(1979, c. 614, s. 1; 1987, c. 516, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "Commission" for "Court" in the first sentence and substituted "all judicial proceedings" for "all proceedings" in subdivision (2).

§ 93A-19. Response and defense by Commission and judgment debtor; proof of conversion.

(a) Whenever the Commission proceeds upon an application as set forth in this Article, counsel for the Commission may defend such action on behalf of the fund and shall have recourse to all appropriate means of defense, including the examination of witnesses. The judgment debtor may defend such action on his own behalf and shall have recourse to all appropriate means of defense, including the examination of witnesses. Within 30 days after service of the application, counsel for the Commission and the judgment debtor may file responses thereto setting forth answers and defenses. Responses shall be filed with the Commission and copies shall be served upon every party by the filing party. If at any time it appears there are no triable issues of fact and the application for payment from the fund is without merit, the Commission shall dismiss the application. A motion to dismiss may be supported by affidavit of any person or persons having knowledge of the facts and may be made on the basis that the application or the judgment referred to therein do not form a basis for meritorious recovery within the purview of G.S. 93A-17, that the applicant has not complied with the provisions of this Article, or that the liability of the fund with regard to the particular licensee or transaction has been exhausted; provided, however, notice of such motion shall be given at least 10 days prior to the time fixed for hearing.

(1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote subsection (a). The amendment also substituted "Response and defense by Commission and judgment debtor" for "Answer and defense by Commission" in the catchline to the section.

§ 93A-20. Order directing payment out of fund; compromise of claims.

Applications for payment from the Real Estate Recovery Fund shall be heard and decided by a majority of the members of the Commission. If, after a hearing, the Commission finds the claim should be paid from the fund, the Commission shall enter an order requiring payment from the fund of whatever sum the Commission shall find to be payable upon the claim in accordance with the limitations contained in this Article.

Subject to Commission approval, a claim based upon the application of an aggrieved person may be compromised; however, the Commission shall not be bound in any way by any compromise or stipulation of the judgment debtor. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 9.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

§ 93A-21. Limitations; pro rata distribution; attorney fees.

(a) Payments from the Real Estate Recovery Fund shall be subject to the following limitations:

(1) The right to recovery under this Article shall be forever barred unless application is made within one year after termination of all proceedings including appeals, in connection with the judgment;

(2) The fund shall not be liable for more than ten thousand dollars ($10,000) per transaction regardless of the number of persons aggrieved or parcels of real estate involved in such transaction; and

(3) The liability of the fund shall not exceed in the aggregate ten thousand dollars ($10,000) for any one licensee within a single calendar year, and in no event shall it exceed in the aggregate twenty thousand dollars ($20,000) for any one licensee.

(4) The fund shall not be liable for payment of any judgment awards of consequential damages, multiple or punitive damages, civil penalties, incidental damages, special damages, interest, costs of court or action or other similar awards.

(b) If the maximum liability of the fund is insufficient to pay in full the valid claims of all aggrieved persons whose claims relate to the same transaction or to the same licensee, the amount for which the fund is liable shall be distributed among the claimants in a ratio that their respective claims bear to the total of such valid claims or in such manner as the Commission deems equitable. Upon petition of the Commission, the Commission may require all claimants and prospective claimants to be joined in one proceeding to the end that the respective rights of all such claimants to the Real Estate Recovery Fund may be equitably resolved.

(c) In the event an aggrieved person is entitled to payment from the fund in an amount of one thousand five hundred dollars ($1,500) or less, the Commission may allow such person to recover from the fund reasonable attorney's fees incurred in effecting such recovery. Reimbursement for attorney's fees shall be limited to those fees incurred in effecting recovery from the fund and shall not include any fee incurred in obtaining judgment against the licensee. (1979, c. 614, s. 1; 1983, c. 81, ss. 2, 15; 1987, c. 516, ss. 10-13.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "Limitations" for "Maximum Liability" in the catchline, added subdivision (a)(4), substituted "Commission" for "court" in the first and second sentences of subsection (b), in the second sentence of subsection (b) substituted "proceeding" for "action" and substituted "resolved" for "adjudicated and settled," and in the first sentence of subsection (c) substituted "one thousand five hundred dollars ($1,500)" for "one thousand dollars ($1,000)" and "Commission" for "court."

§ 93A-22. Repayment to fund; automatic suspension of license.

Should the Commission pay from the Real Estate Recovery Fund any amount in settlement of a claim or toward satisfaction of a judgment against a licensed real estate broker or salesman, the license of the broker or salesman shall be automatically suspended upon the effective date of the order authorizing payment from the fund. No such broker or salesman shall be granted a reinstatement until he has repaid in full, plus interest at the legal rate as provided for in G.S. 24-1, the amount paid from the Real Estate Recovery Fund. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 14.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "the order" for "an order by the court" near the end of the first sentence.

§ 93A-23. Subrogation of rights.

When the Commission has paid from the Real Estate Recovery Fund any sum to the judgment creditor, the Commission shall be subrogated to all of the rights of the judgment creditor to the extent of the amount so paid and the judgment creditor shall assign all his right, title, and interest in the judgment to the extent of the amount so paid to the Commission and any amount and interest so recovered by the Commission on the judgment shall be deposited in the Real Estate Recovery Fund. (1979, c. 614, s. 1; 1983, c. 81, s. 2; 1987, c. 516, s. 15.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, deleted "upon order of the court" following "When" at the beginning of this section.

Article 4.

Time Shares.

§ 93A-39. Title.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For comment, "North Carolina's Time Share Act: Guidelines for Those Who Buy and Sell Time," see 20 Wake Forest L. Rev. 931 (1984).

§ 93A-40. Registration required of time share projects; real estate salesmen license required.

(a) From and after July 1, 1984, it shall be unlawful for any person in this State to engage or assume to engage in the business of a time share salesman without first obtaining a real estate broker or salesman license issued by the North Carolina Real Estate Commission under the provisions of Article I of this Chapter, and it

shall be unlawful for a time share developer to sell or offer to sell a time share located in this State without first obtaining a certificate of registration for the time share project to be offered for sale issued by the North Carolina Real Estate Commission under the provisions of this Article.

(b) A person responsible as general partner, corporate officer, joint venturer or sole proprietor who intentionally acts as a time share developer, allowing the offering of sale or the sale of time shares to a purchaser, without first obtaining registration of the time share project under this Article shall be guilty of a Class I felony. (1983, c. 814, s. 1; 1987, c. 516, s. 16.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, designated the first paragraph as subsection (a) and added subsection (b).

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-41. Definitions.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-42. Time shares deemed real estate.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-43. Partition.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-44. Public offering statement.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-45. Purchaser's right to cancel; escrow; violation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-47. Time shares proxies.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-48. Exchange programs.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-49. Service of process on exchange company.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-50. Securities laws apply.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-51. Rule-making authority.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-52. Application for registration of time share project; denial of registration; renewal; reinstatement; and termination of developer's interest.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-54. Disciplinary action by Commission.

(a) The Commission shall have power to take disciplinary action. Upon its own motion, or on the verified complaint of any person, the Commission may investigate the actions of any time share salesman, developer, or project broker of a time share project registered under this Article, or any other person or entity who shall assume to act in such capacity. If the Commission finds probable cause that a time share salesman, developer, or project broker has violated any of the provisions of this Article, the Commission may hold a hearing on the allegations of misconduct.

The Commission shall have the power to suspend or revoke at any time a real estate license issued to a time share salesman or project broker, or a certificate of registration of a time share project issued to a developer; or to reprimand or censure such salesman, developer, or project broker; or to fine such developer in the amount of five hundred dollars ($500.00) for each violation of this Article, if, after a hearing, the Commission adjudges either the salesman, developer, or project broker to be guilty of:

(1) Making any willful or negligent misrepresentation or any willful or negligent omission of material fact about any time share or time share project;

(2) Making any false promises of a character likely to influence, persuade, or induce;

(3) Pursuing a course of misrepresentation or making of false promises through agents, salesman, advertising or otherwise;

(4) Failing, within a reasonable time, to account for all money received from others in a time share transaction, and failing to remit such monies as may be required in G.S. 93A-45 of this Article;

(5) Acting as a time share salesman or time share developer in a manner as to endanger the interest of the public;

(6) Paying a commission, salary, or other valuable consideration to any person for acts or services performed in violation of this Article;

(7) Any other conduct which constitutes improper, fraudulent, or dishonest dealing;

(8) Performing or undertaking to perform any legal service as set forth in G.S. 84-2.1, or any other acts not specifically set forth in that section;

(9) Failing to deposit and maintain in a trust or escrow account in an insured bank or savings and loan association in North Carolina all money received from others in a time share transaction as may be required in G.S. 93A-45 of this Article or failing to place with an independent escrow agent the funds of a time share purchaser when required by G.S. 93A-42(c);

(10) Failing to deliver to a purchaser a public offering statement containing the information required by G.S. 93A-44 and any other disclosures that the Commission may by regulation require;

(11) Failing to comply with the provisions of Chapter 75 of the General Statutes in the advertising or promotion of time shares for sale, or failing to assure such compliance by persons engaged on behalf of a developer;

(12) Failing to comply with the provisions of G.S. 93A-48 in furnishing complete and accurate information to purchasers concerning any exchange program which may be offered to such purchaser;

(13) Making any false or fraudulent representation on an application for registration;

(14) Violating any rule or regulation promulgated by the Commission;

(15) Failing to record or cause to be recorded a time share instrument as required by G.S. 93A-42(c), or failing to pro-

vide a purchaser the protection against liens required by G.S. 93A-57(a); or

(16) Failing as a time share project broker to exercise reasonable and adequate supervision of the conduct of sales at his project or location by the brokers and salesmen under his control.

(e) When a licensee is accused of any act, omission, or misconduct under this Article which would subject the licensee to disciplinary action, the licensee may, with the consent and approval of the Commission, surrender his or its license and all the rights and privileges pertaining to it for a period of time to be established by the Commission. A licensee who surrenders his or its license shall not be eligible for, or submit any application for, licensure as a real estate broker or salesman or registration of a time share project during the period of license surrender. For the purposes of this section, the term licensee shall include a time share developer. (1983, c. 814, s. 1; 1985, c. 578, ss. 6-10; 1987, c. 516, ss. 17, 18.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1987 amendment, effective October 1, 1987, deleted a former final sentence of the first paragraph of subsection (a), which read "All such hearings shall be conducted in accordance with the provisions of Chapter 150A of the General Statutes," and added subsection (e).

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-56. Penalty for violation of Article.

Except as provided in G.S. 93A-40(b) and G.S. 93A-58, any person violating the provisions of this Article shall be guilty of a misdemeanor and shall be punished by a fine, imprisonment, or both, in the discretion of the court. (1983, c. 814, s. 1; 1985, c. 578, s. 11; 1987, c. 516, s. 19.)

Effect of Amendments. —

The 1987 amendment, effective October 1, 1987, inserted "G.S. 93A-40(b) and."

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-57. Release of liens.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-58. Registrar required; criminal penalties; project broker.

(b) A time share registrar shall be guilty of a Class J felony if he knowingly or recklessly fails to record or cause to be recorded a time share instrument as required by this Article.

A person responsible as general partner, corporate officer, joint venturer or sole proprietor of the developer of a time share project shall be guilty of a Class I felony if he intentionally allows the

offering for sale or the sale of time share to purchasers without first designating a time share registrar.

(1985, c. 578, s. 13; 1987, c. 516, s. 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added the second paragraph of subsection (b).

Chapter 93D.

North Carolina State Hearing Aid Dealers and Fitters Board.

§ 93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.

(c) The Board shall:

(1) Authorize all disbursements necessary to carry out the provisions of this Chapter;

(2) Supervise and administer qualifying examinations to test and determine the knowledge and proficiency of applicants for licenses;

(3) Issue licenses to qualified persons who apply to the Board;

(4) Obtain audiometric equipment and facilities necessary to carry out the examination of applicants for licenses;

(5) Suspend or revoke licenses pursuant to this Chapter;

(6) Make and publish rules and regulations (including a code of ethics) which are necessary and proper to regulate the fitting and selling of hearing aids and to carry out the provisions of this Chapter;

(7) Exercise jurisdiction over the hearing of complaints, charges of malpractice including corrupt or unprofessional conduct, and allegations of violations of the Board's rules or regulations, which are made against any fitter and seller of hearing aids in North Carolina;

(8) Require the periodic inspection and calibration of audiometric testing equipment of persons who are fitting and selling hearing aids;

(9) In connection with any matter within the jurisdiction of the Board, summon and subpoena and examine witnesses under oath and to compel their attendance and the production of books, papers, or other documents or writings deemed by the Board to be necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary and treasurer or the president of the Board and shall have the force and effect of a summons or subpoena issued by a court of record. Any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to contempt charges. The Board shall pay to any witness subpoenaed before it the fees and per diem as paid witnesses in civil actions in the superior court of the county where such hearing is held;

(10) Inform the Attorney General of any information or knowledge it acquires regarding any "price-fixing" activity what-

soever in connection with the sales and service of hearing aids;

(11) Establish and enforce regulations which will guarantee that a full refund will be made by the seller of a hearing aid to the purchaser when presented with a written medical opinion of an otolaryngologist that the purchaser's hearing cannot be improved by the use of a hearing aid;

(12) Fund, establish, conduct, approve and sponsor instructional programs for registered apprentices and for persons who hold a license as well as for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to the extent that the Board deems such instructional programs to be beneficial or necessary;

(13) Register persons serving as apprentices as set forth in G.S. 93D-9.

(1969, c. 999; 1973, c. 1331, s. 3; c. 1345, ss. 1, 2; 1975, c. 550, s. 1; 1981, c. 601, ss. 2-5; 1987, c. 827, s. 80.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted "in the manner set forth in Chapter 150A of the General Statutes" following "contempt charges" in the third sentence of subdivision (c)(9).

Chapter 94.

Apprenticeship.

§ 94-6. Definition of an apprentice.

CASE NOTES

Cited in Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985).

Chapter 95.

Department of Labor and Labor Regulations.

Article 1.

Department of Labor.

§ 95-1. Department of Labor established.

CASE NOTES

Unfair or Deceptive Trade Practices. — Although this Chapter is regulatory in nature, this fact does not prevent the finding of an unfair or deceptive trade practice (see Chapter 75) based on the conduct proscribed by this Chapter. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

§ 95-2. Election of Commissioner; term; salary; vacancy.

The Commissioner of Labor shall be elected by the people in the same manner as is provided for the election of the Secretary of State. The term of office of the Commissioner of Labor shall be four years, and the salary of the Commissioner of Labor shall be set by the General Assembly in the Current Operations Appropriations Act. Any vacancy in the office shall be filled by the Governor, until the next general election. The office of the Department of Labor shall be kept in the City of Raleigh and shall be provided for as are other public offices of the State. In addition to the salary set by the General Assembly in the Current Operations Appropriations Act, longevity pay shall be paid on the same basis as is provided to employees of the State who are subject to the State Personnel Act. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; C.S., s. 7310; 1931, c. 312, s. 2; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 349; 1943, c. 499, s. 2; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 5; 1967, c. 1130; c. 1237, s. 5; 1969, c. 1214, s. 5; 1971, c. 912, s. 5; 1973, c. 778, s. 5; 1975, 2nd Sess., c. 983, s. 20; 1977, c. 802, s. 42.11; 1983, c. 761, s. 207; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 738, s. 32(b).)

Editor's Note. — Session Laws 1987, c. 738, which added the last sentence, provides in s. 32(d): "This section shall only effect [sic] longevity payments on and after July 1, 1987."

Session Laws 1987, c. 738, s. 1.1 provides c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

Effect of Amendments. —

The 1987 amendment, effective July 1, 1987, added the final sentence.

Article 2A.

Wage and Hour Act.

§ 95-25.1. Short title and legislative purpose.

CASE NOTES

This Article requires an employer to notify an employee in advance of the wages and hours which he will earn and the conditions which must be met to earn them, and to pay such wages and benefits as are due when the employee has actually performed the work required to earn them. Once the employee has earned wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer may cause a loss or forfeiture of such pay if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned. Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

§ 95-25.2. Definitions.

CASE NOTES

Quoted in Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205 (1985).

§ 95-25.3. Minimum wage.

(a) Every employer shall pay to each employee who in any workweek performs any work, wages of at least two dollars and seventy-five cents ($2.75) per hour effective July 1, 1979, two dollars and ninety cents ($2.90) per hour effective July 1, 1980, three dollars and ten cents ($3.10) per hour effective January 1, 1982 and three dollars and thirty-five cents ($3.35) per hour effective January 1, 1983 except as authorized below. If before June 1, 1989, the minimum wage set forth in the Fair Labor Standards Act is increased above three dollars and thirty-five cents ($3.35) per hour, the minimum wage required under this section shall increase by the same amount, but shall not increase above four dollars ($4.00) per hour, effective the same date the increase under the Fair Labor Standards Act is effective.

(1959, c. 475; 1963, c. 816; 1965, c. 229; 1969, c. 34, s. 1; 1971, c. 138; 1973, c. 802; 1975, c. 256, s. 1; 1977, c. 519; 1979, c. 839, s. 1; 1981, c. 493, s. 1; c. 663, s. 13; 1983, c. 708, s. 1; 1985, c. 97; c. 79.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, substituted "June 1, 1989" for "July 1, 1987" and substituted "four dollars ($4.00)" for "three dollars and sixty cents ($3.60)" in the last sentence of subsection (a).

CASE NOTES

Stated in Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205 (1985).

§ 95-25.4. Overtime.

CASE NOTES

Stated in Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205 (1985).

§ 95-25.5. Youth employment.

(*l*) Notwithstanding any other provision of this section, any youth who holds a North Carolina driver's license valid for the type of driving involved may be assigned as part of his employment to drive an automobile or truck not exceeding 6,000 pounds gross vehicle weight within a 25-mile radius of the principal place of employment, provided that the youth has completed a State-approved driver-education course, and provided that the assignment does not involve the towing of vehicles. "Gross vehicle weight" includes the truck chassis with lubricants, water and full tank or tanks of fuel, plus the weight of the cab or driver's compartment, body and special chassis and body equipment, and payload. (1937, c. 317, ss. 1-3, 6, 9, 18; 1943, c. 670; 1951, c. 1187, s. 1; 1967, cc. 173, 764; 1969, c. 962; 1973, c. 649, s. 1; c. 758, s. 1; 1977, c. 551, ss. 1-4; 1979, c. 839, s. 1; 1981, c. 412, ss. 3, 4; c. 489, ss. 1-7; c. 747, s. 66; 1985, c. 97, s. 1; 1987, c. 154.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective May 8, 1987, added subsection (*l*).

CASE NOTES

Cited in Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 350 S.E.2d 83 (1986).

§ 95-25.7. Payment to separated employees.

CASE NOTES

Section Preempted by ERISA. — Regulation of severance pay under ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., preempts this section and any state cause of action under common law insofar as such claim "relates to" an employee benefit plan covered by ERISA. Holland v. Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985), aff'd sub nom. Brooks v. Burlington Indus., Inc., — U.S. —, 106 S. Ct. 3267, 91 L. Ed. 2d 559, cert. denied, — U.S. —, 106 S. Ct. 3271, 91 L. Ed. 2d 562 (1986).

§ 95-25.12. Vacation pay.

CASE NOTES

This Article requires an employer to notify an employee in advance of the wages and hours which he will earn and the conditions which must be met to earn them, and to pay such wages and benefits as are due when the employee has actually performed the work required to earn them. Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer may cause a loss or forfeiture of such pay if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned. Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

The vacation pay due an employee at the termination of his employment is not controlled solely by the employer's vacation policy in effect at the time of termination. If the employee earned and accumulated vacation under a vacation policy which did not provide for forfeiture of unused vacation, this Article would dictate that he receive all vacation pay earned prior to the employer's change of personnel policy with regard thereto. Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

§ 95-25.13. Notification, posting, and records.

CASE NOTES

Stated in Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205 (1985).

§ 95-25.14. Exemptions.

CASE NOTES

No Recovery of Attorney's Fees from City. — In view of this section, which explicitly exempts this State and any city, town or municipality from the application of Article 2A of this Chapter, § 95-25.22(d), relating to the recovery of attorney's fees, had no application to plaintiff who sought to compel city to pay him for stand-by duty worked for the city police department, and the trial court was in error in awarding such fees. Newber v. City of Wilmington, 83 N.C. App. 327, 350 S.E.2d 125 (1986), cert. denied and appeal dismissed, — N.C. —, 353 S.E.2d 402 (1987).

§ 95-25.19. Rules.

The Commissioner may adopt rules needed to implement this Article. (1937, c. 317, s. 18; 1975, c. 413, s. 12; 1979, c. 839, s. 1; 1987, c. 827, s. 262.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, rewrote this section.

§ 95-25.20. Complainants protected.

CASE NOTES

Cited in Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).

§ 95-25.22. Recovery of unpaid wages.

CASE NOTES

No Recovery of Attorney's Fees from City. — In view of § 95-25.14, which explicitly exempts this State and any city, town or municipality from the application of Article 2A of this Chapter, subsection (d) of this section, relating to the recovery of attorney's fees, had no application to plaintiff who sought to compel city to pay him for stand-by duty worked for the city police department, and the trial court was in error in awarding such fees. Newber v. City of Wilmington, 83 N.C. App. 327, 350 S.E.2d 125 (1986), cert. denied and appeal dismissed, — N.C. —, 353 S.E.2d 402 (1987).

Article 4A.

Voluntary Arbitration of Labor Disputes.

§ 95-36.8. Enforcement of arbitration agreement and award.

CASE NOTES

Arbitrator's Decision Bars Later Legal Claim. — Where plaintiff participated in binding arbitration pursuant to a collective bargaining agreement, the arbitrator's decision that plaintiff was discharged for "just cause" was binding on him and barred his claim for wrongful or retaliatory discharge. Shreve v. Duke Power Co., — N.C. App. —, 354 S.E.2d 357 (1987).

§ 95-36.9. Stay of proceedings.

CASE NOTES

Limitation of Action under Labor Management Relations Act. — In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in § 1-567.13(b), for vacating an award, rather than the 10-day limitation set forth in subsection (c) of this section for a stay of proceedings, notwithstanding the provision in § 1-567.2 that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since § 1-567.13(b) was the statute of limitations most analogous for the determination of timeliness. In re Gencorp, Inc., 622 F. Supp. 216 (W.D.N.C. 1985).

Article 5A.

Regulation of Private Personnel Services.

§ 95-47.2. Licensing procedures.

(d) Upon the receipt of an application for a license the Commissioner:

(1) Shall publish a notice of the pending application in a newspaper of general circulation in the area of the proposed location of the employment agency and may publish the notice in a newspaper of general circulation in each area in which the applicant (or if a corporation, the president and majority shareholder) has resided during the five years preceding the time of the application. The notice shall include a statement informing individuals of their right to protest the issuance of a license by filing within 10 days written comments with the Commissioner. The protest shall be in writing and signed by the person filing the protest or by his authorized agent or attorney, and shall state reasons why the license should not be granted. Upon the filing of a protest, the Commissioner, if he determines the protest to be of such a nature that a hearing should be conducted and that the protest is for a cause on which denial of a license may properly be based, shall appoint a time and place for a hearing on the application and shall give at least seven days' notice of that time and place to the license applicant and to the person filing the protest. The hearing shall be conducted in accordance with the provisions of the rules of the Administrative Procedure Act;

(2) Shall investigate the character, criminal record and business integrity of each applicant for agency license and shall investigate the criminal records of all persons listed as agency owners, officers, directors or managers. The applicant and all agency owners, officers, directors and managers shall assist the department in obtaining necessary information by authorizing the release of all relevant information;

(3) Upon completion of the investigation, or 30 days after the application was received, whichever is later, but in no case

more than 45 days after the application was received, shall determine whether or not a license should be issued. The license shall be denied for any of the following reasons:

a. If the applicant for agency license, or the president or majority shareholder of a corporate applicant, omits or falsifies any material information asked for in the application and required by the Commissioner;

b. If any owner, officer, director or manager of the employment agency:

1. Has been convicted in any state of the criminal offense of embezzlement, obtaining money under false pretenses, forgery, conspiracy to defraud or any similar offense involving fraud or moral turpitude;

2. Was an owner, officer, director or manager of an employment agency or other business whose license was revoked or that was otherwise caused to cease operation by action of any State or federal agency or court because of violations of law or regulation relating to deceptive or unfair practices in the conduct of business;

3. As an owner or manager of an employment agency or other business or as an employment counselor was found by any State or federal agency or court to have violated any law or regulation relating to deceptive or unfair practices in the conduct of business; or

4. In any other demonstrable way engaged in deceptive or unfair practices in the conduct of business;

c. If the employment agency will be operated on the same premises as a loan agency (as defined in G.S. 105-88) or collection agency (as defined in G.S. 66-49.27).

(1929, c. 178, ss. 2, 3; 1931, c. 312, s. 3; 1979, c. 780, s. 1; 1987, c. 282, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 4, 1987, substituted "G.S. 66-49.27" for "G.S. 66-42" at the end of paragraph (d)(3)c.

§ 95-47.6. Prohibited acts.

CASE NOTES

Unfair or Deceptive Trade Practices. — A violation of either or both subdivisions (2) and (9) of this section as a matter of law constitutes an unfair or deceptive trade practice in violation of § 75-1.1. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Article 5B.

Regulation of Job Listing Services.

§ 95-47.25. Contracts; contents; approval.

CASE NOTES

Cited in Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985).

Article 6.

Separate Toilets for Sexes.

§ 95-48. Separate toilets required.

In the interest of public health and in compliance with G.S. 130A-335 and 143-138, adequate, well-lighted and ventilated toilet facilities plainly lettered and marked, for each sex shall be provided and maintained in a sanitary condition by all persons and corporations employing both males and females. Such toilet facilities shall be separated by full and substantial walls. (1913, c. 83, s. 1; C.S., s. 6559; 1963, c. 1114, s. 1; 1987, c. 282, s. 13.)

Effect of Amendments. — The 1987 amendment, effective June 4, 1987, substituted "G.S. 130A-335" for "G.S. 130-160" in the first sentence.

Article 7A.

Uniform Boiler and Pressure Vessel Act.

§ 95-69.17. Administrative and judicial review of decisions.

(a) A final decision to suspend or revoke an inspector's commission or inspection certificate shall be made in accordance with Chapter 150B of the General Statutes.

(b) A final decision to deny an application for a certificate of competency or to refuse to issue or renew an inspection certificate shall be made in accordance with Chapter 150B of the General Statutes. In a contested case under this subsection, the decision of the Board or Director shall not be stayed pending administrative review.

(c) Article 4 of Chapter 150B of the General Statutes governs judicial review of a final decision in a contested case. (1975, c. 895, s. 10; 1987, c. 827, s. 263.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, rewrote this section.

Article 10.

Declaration of Policy as to Labor Organizations.

§ 95-81. Nonmembership as condition of employment prohibited.

CASE NOTES

Cited in Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).

§ 95-83. Recovery of damages by persons denied employment.

CASE NOTES

Cited in Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).

Article 14.

Inspection Service Fees.

§ 95-109: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 990, s. 3, effective January 1, 1987.

§ 95-110: Reserved for future codification purposes.

Article 14A.

Elevator Safety Act of North Carolina.

§ 95-110.1. Short title and legislative purpose.

(a) This Article shall be known as the Elevator Safety Act of North Carolina.

(b) The General Assembly finds that the use of unsafe and defective lifting devices imposes a substantial probability of serious and preventable injury to employees and the public exposed to unsafe conditions and that prevention of these injuries and protection of employees and the public from unsafe conditions is in the best interests and welfare of the people of the State. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990, makes this Article effective January 1, 1987.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990 provides: "The Commissioner of Labor may begin official rulemaking pursuant to this act immediately upon ratification [July 12, 1986] with such rules as he may adopt to be-

come effective no earlier than January 1, 1987."

§ 95-110.2. Scope.

This Article shall govern the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration, relocation and investigation of accidents involving:

(1) Elevators, dumbwaiters, escalators, and moving walks;
(2) Personnel hoists;
(3) Inclined stairway chair lifts;
(4) Inclined and vertical wheelchair lifts;
(5) Manlifts; and
(6) Special equipment.

This Article shall not apply to devices and equipment located and operated in a single family residence, to conveyors and related equipment within the scope of the American National Standard Safety Standard for Conveyors and Related Equipment (ANSI/ASME B20.1) constructed, installed and used exclusively for the movement of materials, or to mining equipment specifically covered by the Federal Mine Safety and Health Act or the Mine Safety and Health Act of North Carolina or the rules and regulations adopted pursuant thereto. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.3. Definitions.

(a) The term "Commissioner" shall mean the North Carolina Commissioner of Labor or his authorized representative.

(b) The term "Director" shall mean the Director of the Elevator and Amusement Device Division of the North Carolina Department of Labor.

(c) The term "dumbwaiter" shall mean a hoisting and lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction, the floor area of which does not exceed nine square feet, the total inside height of which, whether or not provided with fixed or removable shelves, does not exceed four feet, the capacity of which does not exceed 500 pounds, and which is used exclusively for carrying materials.

(d) The term "elevator" shall mean a hoisting and lowering mechanism equipped with a car or platform which moves in guides, and which serves two or more floors of a building or structure.

(e) The term "escalator" shall mean a power driven, inclined continuous stairway used for raising and lowering passengers.

(f) The term "inclined stairway chair lift" shall mean a hoisting and lowering mechanism with one or more chairs or a platform for one or more wheelchairs installed on a stairway for the purpose of transporting a physically disabled person.

(g) The term "inclined or vertical wheelchair lift" shall mean a powered platform-elevating device used to transport a physically disabled person in a wheelchair.

(h) The term "manlift" shall mean platforms or brackets and accompanying handholds, mounted on, or attached to, an endless belt operating vertically in one direction only and being supported

by, and driven through, pulleys at the top and bottom and intended primarily for the conveyance of persons.

(i) The term "moving walk" shall mean a type of passenger carrying device on which passengers stand or walk and in which the passenger carrying surface remains parallel to its direction of motion and is uninterrupted.

(j) The term "operator" shall mean any person having direct control over the operation of any covered device or equipment.

(k) The term "owner" shall mean any person or authorized agent of such person who owns a device or equipment subject to regulation under this Article, or in the event the device or equipment is leased, the lessee. The term "owner" also shall include the State of North Carolina or any political subdivision thereof or any unit of local government.

(l) The term "person" shall mean any individual, association, partnership, firm, corporation, private organization, or the State of North Carolina or any political subdivision thereof or any unit of local government.

(m) The term "personnel hoist" shall mean an elevator installed inside or outside of buildings during construction, alteration or demolition and used primarily to raise and lower workers and other persons connected with or related to the building project.

(n) The term "special equipment" shall mean any permanently or semi-permanently located device, manually or power-operated, used for moving or lifting person or persons and materials but not considered as an elevator, escalator, dumbwaiter, moving walk, personnel hoist, inclined stairway chair lift, inclined or vertical wheelchair lift, or manlift. Special equipment shall include, but not be limited to, manhoists, lift bridges, elevators which are used only for handling building materials and workmen during construction, and stage and orchestra lifts. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.4. Elevator and Amusement Device Division established.

There is hereby created an Elevator and Amusement Device Division within the Department of Labor. The Commissioner shall appoint a director of the Elevator and Amusement Device Division and such other employees as the Commissioner deems necessary to assist the director in administering the provisions of this Article. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.5. Powers and duties of Commissioner.

The Commissioner of Labor is hereby empowered:

(1) To delegate to the Director of the Elevator and Amusement Device Division such powers, duties and responsibilities as the Commissioner determines will best serve the public interest in the safe operation of lifting devices and equipment;

(2) To supervise the Director of the Elevator and Amusement Device Division;

(3) To adopt, modify, or revoke such rules and regulations as are necessary for the purpose of carrying out the provisions of this Article including, but not limited to, those governing the design, construction, installation, plans review,

testing, inspection, certification, operation, use, maintenance, alteration and relocation of devices and equipment subject to the provisions of this Article. The rules and regulations promulgated pursuant to this rulemaking authority shall conform with good engineering practice as evidenced generally by the most recent editions of the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks, the National Electrical Code, the American National Standard Safety Requirements for Personnel Hoists, the American National Standard Safety Code for Manlifts, the American National Standard Safety Standard for Conveyors and Related Equipment and similar codes promulgated by agencies engaged in research concerning strength of material, safe design, and other factors bearing upon the safe operation of the devices and equipment subject to the provisions of this Article. The rules and regulations may apply different standards to devices and equipment subject to this Article depending upon their date of installation. The rules and regulations for special equipment shall not adopt specifically any portion of the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks to inclined and vertical reciprocating conveyors;

(4) To enforce rules and regulations adopted under authority of this Article;

(5) To inspect and have tested for acceptance all new, altered or relocated devices or equipment subject to the provisions of this Article;

(6) To make maintenance and periodic inspections and tests of all devices and equipment subject to the provisions of this Article as often as every six months;

(7) To issue certificates of operation which certify for use such devices and equipment as are found to be in compliance with this Article and the rules and regulations promulgated thereunder;

(8) To have free access, with or without notice, to the devices and equipment subject to the provisions of this Article, during reasonable hours, for purposes of inspection or testing;

(9) To obtain an Administrative Search and Inspection Warrant in accordance with the provisions of Article 4A of Chapter 15 of the General Statutes;

(10) To investigate accidents involving the devices and equipment subject to the provisions of this Article to determine the cause of such accident, and he shall have full subpoena powers in conducting such investigation;

(11) To institute proceedings in the civil or criminal courts of this State, when a provision of this Article or the rules and regulations promulgated thereunder has been violated;

(12) To issue a limited certificate of operation for any device or equipment subject to the provisions of this Article to allow the temporary or restricted use thereof;

(13) To adopt, modify or revoke rules and regulations governing the qualifications of inspectors;

(14) To grant exceptions from the requirements of the rules and regulations promulgated under authority of this Article and to permit the use of other devices when such exceptions and uses will not expose the public to an unsafe condition likely to result in serious personal injury or property damage;

(15) To require that a construction permit must be obtained from the Commissioner before any device or equipment subject to the provisions of this Article is installed, altered or moved from one place to another and to require that the Commissioner must be supplied with whatever plans, diagrams or other data he deems necessary to determine whether or not the proposed construction is in compliance with the provisions of this Article and the rules and regulations promulgated thereunder;

(16) To prohibit the use of any device or equipment subject to the provisions of this Article which is found upon inspection to expose the public to an unsafe condition likely to cause personal injury or property damage. Such device or equipment shall be made operational only upon the Commissioner's determination that such device or equipment has been made safe;

(17) To order the payment of all civil penalties provided by this Article. Funds collected pursuant to a civil penalty order shall be deposited with the State Treasurer;

(18) To require that any device or equipment subject to the provisions of this Article which has been out-of-service and not continuously maintained for one or more years shall not be returned to service without first complying with all rules and regulations governing new installations; and

(19) To coordinate enforcement and inspection activity relative to equipment, devices and operations covered by this Article in order to minimize duplication of liability or regulatory responsibility on the part of the employer or owner. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990 provides: "The Commissioner of Labor may begin official rulemaking pursuant to this act immediately upon ratification [July 12, 1986] with such rules as he may adopt to become effective no earlier than January 1, 1987."

§ 95-110.6. Noncomplying devices and equipment; appeal.

(a) Whenever the Commissioner determines that a device or equipment is subject to the provisions of this Article, and that the operation of such device or equipment is exposing the public to an unsafe condition likely to result in serious personal injury or property damage, he may immediately order in writing that the use of the device or equipment be stopped or limited until such time as he determines that the device or equipment has been made safe for use by the public.

(b) Whenever the Commissioner determines that the provisions of this Article or the rules and regulations promulgated thereunder have not been complied with, he may refuse to issue or renew or may revoke, suspend or amend a certificate of operation.

(c) Whenever action is taken under this section, the affected party shall be given notice of the availability of an administrative hearing and of judicial review in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.7. Operation without certificate; operation not in accordance with Article or rules and regulations; operation after refusal to issue or after revocation of certificate.

(a) No person shall operate or permit to be operated or use any device or equipment subject to the provisions of this Article without a valid certificate of operation unless the absence of a valid certificate is the result of the Commissioner's failure to inspect such device.

(b) No person shall operate or permit to be operated or use any device or equipment subject to the provisions of this Article otherwise than in accordance with this Article and the rules and regulations promulgated thereunder.

(c) No person shall operate or permit to be operated or use any device or equipment subject to the provisions of this Article after the Commissioner has refused to issue or has revoked the certificate of operation for such device or equipment. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.8. Operation of unsafe device or equipment.

No person shall operate, permit to be operated or use any device or equipment subject to the provisions of this Article if such person knows or reasonably should know that such operation or use will expose the public to an unsafe condition which is likely to result in personal injury or property damage. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.9. Reports required.

(a) The owner of any device or equipment regulated under the provisions of this Article, or his authorized agent, shall within 24 hours notify the Commissioner of each and every occurrence involving such device or equipment when:

(1) The occurrence results in death or injury requiring medical treatment, other than first aid, by a physician. First aid means the one time treatment or observation of scratches, cuts not requiring stitches, burns, splinters and contusions or a diagnostic procedure, including examination and x-rays, which does not ordinarily require medical treatment even though provided by a physician or other licensed personnel; or

(2) The occurrence results in damage to the device indicating a substantial defect in design, mechanics, structure or equip-

ment, affecting the future safe operation of the device. No reporting is required in the case of normal wear and tear.

(b) The Commissioner, without delay, after notification and determination that an occurrence involving injury or damage as specified in subsection (a) has occurred, shall make a complete and thorough investigation of the occurrence. The report of the investigation shall be placed on file in the office of the division and shall give in detail all facts and information available. The owner may submit for inclusion in the file results of investigations independent of the department's investigation.

(c) No person, following an occurrence as specified in subsection (a), shall operate, attempt to operate, use or move or attempt to move such device or equipment, or part thereof, without the approval of the Commissioner, unless so as to prevent injury to any person or persons.

(d) No person, following an occurrence as specified in subsection (a), shall remove or attempt to remove from the premises any damaged or undamaged part of such device or equipment or repair or attempt to repair any damaged part necessary to a complete and thorough investigation. The department must initiate its investigation within 24 hours of being notified. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.10. Violations; civil penalties; appeals.

(a) Any person who violates G.S. 95-110.7(a) or (b) (Operation without certificate; operation not in accordance with Article or rules and regulations) shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250.00) for each day each device or equipment is so operated or used.

(b) Any person who violates G.S. 95-110.7(c) (Operation after refusal to issue or after revocation of certificate) or G.S. 95-110.9(c) (Reports required) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00) for each day any such device or equipment is operated or used.

(c) Any person who violates the provisions of G.S. 95-110.9(d) (Reports required) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00).

(d) In determining the amount of any penalty ordered under authority of this section, the Commissioner shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person being charged, the gravity of the violation, the good faith of the person and the record of previous violations.

(e) The determination of the amount of the penalty by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination in which event the final determination of the penalty shall be made in an administrative proceeding and in a judicial proceeding pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act.

(f) The Commissioner may file in the office of the clerk of the superior court of the county wherein the person, against whom a civil penalty has been ordered, resides, or if a corporation is involved, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation oc-

curred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Whereupon, the clerk of said court shall enter judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.11. Violations; criminal penalties.

(a) Any person who violates G.S. 95-110.8 (Operation of unsafe device or equipment) shall be guilty of a misdemeanor and upon conviction thereof shall be fined one thousand dollars ($1,000), or imprisoned for a period of six months, or both, in the discretion of the court.

(b) Any person misrepresenting himself as an authorized inspector administering or enforcing the provisions of this Article or the rules and regulations promulgated thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be fined one thousand dollars ($1,000), or imprisoned for a period of six months, or both, in the discretion of the court.

(c) Any person knowingly making a material and false statement, representation or certification in any application, record, report, plan or any other document filed or required to be maintained pursuant to this Article or the rules and regulations promulgated thereunder shall be fined a maximum of five thousand dollars ($5,000), or imprisoned for not more than six months, or both, in the discretion of the court. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.12. Legal representation.

It shall be the duty of the Attorney General of North Carolina, when requested, to represent the Department of Labor in actions or proceedings in connection with this Article or the rules and regulations promulgated thereunder. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.13. Authorization for similar safety and health federal-State programs.

Consistent with the requirements and conditions provided in this Article and the rules and regulations promulgated thereunder, the State, upon recommendation of the Commissioner of Labor, may enter into agreements or arrangements with appropriate federal agencies for the purpose of administering the enforcement of federal statutes and rules and regulations governing devices and equipment subject to the provisions of this Article. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.14. Confidentiality of trade secrets.

All information reported to or otherwise obtained by the Commissioner or his agents or representatives in connection with any inspection or proceeding under this Article or the rules and regulations promulgated thereunder which contains or might reveal a trade secret shall be considered confidential, except as to carrying out this Article and the rules and regulations promulgated thereunder, or when it is relevant in any proceeding under the same. In any such proceeding the Commissioner or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.15. Construction of Article and rules and regulations and severability.

This Article and the rules and regulations promulgated thereunder shall receive a liberal construction to the end that the welfare of the people may be protected. If any provisions of either or the application thereof to any person or circumstances is held to be invalid, such invalidity shall not affect those provisions or applications which can be given effect without the invalid provision or application, and to that end the provisions of this Article are severable. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-111: Reserved for future codification purposes.

Article 14B.

Amusement Device Safety Act of North Carolina.

§ 95-111.1. Short title and legislative purpose.

(a) This Article shall be known as the "Amusement Device Safety Act of North Carolina".

(b) The General Assembly finds that although most amusement devices are free from defect and operated in a safe manner, those which are not impose a substantial probability of serious and preventable injury to the public. Protection of the public from exposure to such unsafe conditions and the prevention of injuries is in the best interest and welfare of the people of the State.

(c) It is the intent of this Article that amusement devices shall be designed, constructed, assembled or disassembled, maintained, and operated so as to prevent injuries. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990, makes this Article effective January 1, 1987.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990 provides: "The Commissioner of Labor may begin official rulemaking pursuant to this act immediately upon ratification [July 12, 1986] with such rules as he may adopt to become effective no earlier than January 1, 1987."

§ 95-111.2. Scope.

(a) This Article shall govern the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration, relocation and investigation of accidents involving amusement devices.

(b) This Article shall not apply to any single passenger coin-operated device, manually, mechanically, or electrically operated which customarily is placed, singly or in groups, in a public location and which does not normally require the supervision or services of an operator. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.3. Definitions.

(a) The term "amusement device" shall mean any device or attraction that carries or conveys or permits persons to walk along, around or over a fixed or restricted route or course or within a defined area including the entrances and exits thereto, for the purpose of giving such persons amusement, pleasure, thrills or excitement. The term shall include but not be limited to roller coasters, Ferris wheels, merry-go-rounds, glasshouses, waterslides, and walk-through dark houses.

(b) The term "amusement park" shall mean any tract or area used principally as a permanent location for amusement devices.

(c) The term "Commissioner" shall mean the North Carolina Commissioner of Labor or his authorized representative.

(d) The term "Director" shall mean the Director of the Elevator and Amusement Device Division of the North Carolina Department of Labor.

(e) The term "operator" shall mean any person having direct control of the operation of an amusement device.

(f) The term "owner" shall mean any person or authorized agent of such person who owns an amusement device or in the event such device is leased, the lessee. The term "owner" also shall include the State of North Carolina or any political subdivision thereof or any unit of local government.

(g) The term "person" shall mean any individual, association, partnership, firm, corporation, private organization, or the State of North Carolina or any political subdivision thereof or any unit of local government.

(h) The term "waterslide" shall mean a stationary amusement device that provides a descending ride on a flowing water film through a trough or tube or on an inclined plane into a pool of water. This term does not include devices where the vertical distance between the highest and the lowest points does not exceed 15 feet. (1985 (Reg. Sess., 1986), c. 990, s. 2; 1987, c. 864, s. 90(a).)

Effect of Amendments. — The 1987 amendment, effective August 14, 1987, added subsection (h).

§ 95-111.4. Powers and duties of Commissioner.

The Commissioner of Labor is hereby empowered:

(1) To delegate to the Director of the Elevator and Amusement Device Division such powers, duties and responsibilities as the Commissioner determines will best serve the public interest in the safe operation of amusement devices;

(2) To supervise the Director of the Elevator and Amusement Device Division;

(3) To adopt, modify, or revoke such rules and regulations as are necessary for the purpose of carrying out the provisions of this Article including, but not limited to, those governing the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration and relocation of devices subject to the provisions of this Article. The rules and regulations promulgated pursuant to this rulemaking authority shall conform with good engineering and safety standards, formulas and practices;

(4) To enforce rules and regulations adopted under authority of this Article;

(5) To inspect and have tested for acceptance all new and relocated devices subject to the provisions of this Article. Relocated amusement devices shall be inspected upon reassembly at each new location within this State; provided that the Commissioner may provide for less frequent inspections when he determines that the device is of such a type and its use is of such a nature that inspection less often than upon each reassembly would not expose the public to an unsafe condition likely to result in serious personal injury or property damage;

(6) To inspect amusement devices which have been substantially rebuilt or substantially modified so as to change the original action, structure or capacity of the device;

(7) To make maintenance and periodic inspections and tests of all devices subject to the provisions of this Article. Devices located in amusement parks shall be inspected at least once annually;

(8) To issue certificates of operation which certify for use such devices as are found to be in compliance with this Article and the rules and regulations promulgated thereunder;

(9) To have reasonable access, with or without notice, to the devices subject to the provisions of this Article during reasonable hours, for purposes of inspection or testing;

(10) To obtain an Administrative Search and Inspection Warrant in accordance with the provisions of Article 4A of Chapter 15 of the General Statutes;

(11) To investigate accidents involving devices subject to the provisions of this Article to determine the cause of such accident, and he shall have full subpoena powers in conducting such investigation;

(12) To institute proceedings in the civil courts of this State, when a provision of this Article or the rules and regulations promulgated thereunder has been violated;

(13) To adopt, modify or revoke rules and regulations governing the qualifications of inspectors;

(14) To grant exceptions from the requirements of the rules and regulations promulgated under authority of this Article and to permit the use of other devices when such exceptions and uses will not expose the public to an unsafe condition likely to result in serious personal injury or property damage;

(15) To require that before any device subject to the provisions of this Article is erected in this State, or before any additions or alterations which substantially change such device are made, or before the physical spacing between such devices is changed, the owner or his authorized agent shall file with the Commissioner a written notice of his intention to do so and the type of device involved. Should circumstances necessitate, the Commissioner may require that such owner or his authorized agent furnish a copy of the plans, diagrams, specifications or stress analyses of such device before the inspection of same. When such plans, diagrams, specifications or stress analyses are requested by the Commissioner, he shall review them within 10 days of receipt, and upon approval, he shall authorize the device for use by the public;

(16) To prohibit the use of any device subject to the provisions of this Article which is found upon inspection to expose the public to an unsafe condition likely to cause personal injury or property damage. Such device shall be made operational only upon the Commissioner's determination that such device has been made safe;

(17) To order the payment of all civil penalties provided by this Article. Funds collected pursuant to a civil penalty order shall be deposited with the State Treasurer; and

(18) To coordinate enforcement and inspection activity relative to equipment, devices and operations covered by this Article in order to minimize duplication of liability or regulatory responsibility on the part of the employer or owner. (1985 (Reg. Sess., 1986), c. 990, s. 2; 1987, c. 635, s. 2.)

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990 provides: "The Commissioner of Labor may begin official rulemaking pursuant to this act immediately upon ratification [July 12, 1986] with such rules as he may adopt to become effective no earlier than January 1, 1987."

Effect of Amendments. — The 1987 amendment, effective July 17, 1987, added the proviso at the end of the second sentence of subdivision (5).

§ 95-111.5. Pre-opening inspection and test; records; revocation of certificate of operation.

(a) An owner of a device subject to the provisions of this Article, or his authorized agent, is hereby required to make a pre-opening inspection and test of such device, prior to admitting the public, each day such device is intended to be used.

(b) An owner of a device subject to the provisions of this Article, or his authorized agent, is hereby required to maintain for at least 30 days a signed record of the required pre-opening inspection and test and such other pertinent information as the Commissioner may require by rule or regulation.

(c) The Commissioner is hereby empowered to revoke the certificate of operation for any device regulated by this Article upon failure by the owner or his authorized agent to make the required preopening inspection and test or to maintain the required record. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.6. Noncomplying devices; appeal.

(a) Whenever the Commissioner determines that a device is subject to the provisions of this Article and the operation of such device is exposing the public to an unsafe condition likely to result in serious personal injury or property damage, he immediately may order in writing that the use of the device be stopped or limited until such time as he determines that the device has been made safe for use by the public.

(b) Whenever the Commissioner determines that the provisions of this Article or the rules and regulations promulgated thereunder have not been complied with, he may refuse to issue or renew or may revoke, suspend or amend a certificate of operation.

(c) Whenever action is taken under this section, the affected party shall be given notice of the availability of an administrative hearing and of judicial review in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.7. Operation without certificate; operation not in accordance with Article or rules and regulations; operation after refusal to issue or after revocation of certificate.

(a) No person shall operate or permit to be operated or use any device subject to the provisions or this Article without a valid certificate of operation.

(b) No person shall operate or permit to be operated or use any device subject to the provisions of this Article otherwise than in accordance with this Article and the rules and regulations promulgated thereunder.

(c) No person shall operate or permit to be operated or use any device subject to the provisions of this Article after the Commissioner has refused to issue or has revoked the certificate of operation for such device. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.8. Location notice.

No person shall operate for the public or permit the operation for the public any device subject to the provisions of this Article after initial assembly or after reassembly at any location within this State without first notifying the Commissioner of the intention to operate for the public. Written notice of a planned schedule of operation or use shall be received at least five days prior to the first planned date of operation or use. Notice of unscheduled use shall be given immediately to the Commissioner by telephone or telegraph. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.9. Operation of unsafe device.

No person shall operate, permit to be operated or use any device subject to the provisions of this Article if such person knows or reasonably should know that such operation or use will expose the public to an unsafe condition which is likely to result in personal injury or property damage. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.10. Reports required.

(a) The owner of any device regulated under the provisions of this Article, or his authorized agent, shall within 24 hours, notify the Commissioner of each and every occurrence involving such device when:

(1) The occurrence results in death or injury requiring medical treatment, other than first aid, by a physician. First aid means the one time treatment or observation of scratches, cuts not requiring stitches, burns, splinters and contusions or a diagnostic procedure, including examination and x-rays, which does not ordinarily require medical treatment even though provided by a physician or other licensed personnel; or

(2) The occurrence results in damage to the device indicating a substantial defect in design, mechanics, structure or equipment, affecting the future safe operation of the device. No reporting is required in the case of normal wear and tear.

(b) The Commissioner, without delay, after notification and determination that an occurrence involving injury or damage as specified in subsection (a) has occurred, shall make a complete and thorough investigation of the occurrence. The report of the investigation shall be placed on file in the office of the division and shall give in detail all facts and information available. The owner may submit for inclusion in the file results of investigations independent of the department's investigation.

(c) No person, following an occurrence as specified in subsection (a), shall operate, attempt to operate, use or move or attempt to move such device or part thereof, without the approval of the Commissioner, unless so as to prevent injury to any person or persons.

(d) No person, following an occurrence as specified in subsection (a), shall remove or attempt to remove from the premises any damaged or undamaged part of such device or repair or attempt to repair any damaged part necessary to a complete and thorough investigation. The department must initiate its investigation within 24 hours of being notified. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.11. Operators.

Any operator of a device subject to the provisions of this Article shall be at least 18 years of age. An operator shall operate no more than one device at any given time. An operator shall be in attendance at all times the device is in operation. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.12. Liability insurance.

(a) No owner shall operate a device subject to the provisions of this Article, unless at the time, there is in existence a contract of insurance providing coverage of not less than one million dollars ($1,000,000) per occurrence against liability for injury to persons or property arising out of the operation or use of such device or there is in existence a contract of insurance providing coverage of not less than five hundred thousand dollars ($500,000) per occurrence against liability for injury to persons or property arising out of the operation or use of the amusement devices if the annual gross volume of the devices does not exceed two hundred seventy-five thousand dollars ($275,000); provided waterslides shall not be required to be insured as herein provided for an amount in excess of one hundred thousand dollars ($100,000) per occurrence. The insurance contract to be provided must be by any insurer or surety that is acceptable to the North Carolina Insurance Commissioner and authorized to transact business in this State.

(b) No certificate of operation shall be issued by the Commissioner until such time as the owner or his authorized agent provides proof of the required contract of insurance.

(c) The Commissioner shall have the right to request from the owner of a device regulated by this Article, or his authorized agent, proof of the required contract of insurance, and upon failure of the owner or his authorized agent to provide such proof, the Commissioner shall have the right to prevent the commencement of or to stop the operation of the device until such time as proof is provided.

(d) Operators of waterslides, as defined in G.S. 95-111.3(h), shall notify the Commissioner of all incidences of personal injury involving the waterslides, as required by G.S. 95-111.10(a). (1985 (Reg. Sess., 1986), c. 990, s. 2; 1987, c. 635, s. 1; c. 864, ss. 90(b), 91(a).)

Editor's Note. — Session Laws 1987, c. 864, s. 91(b) provides that s. 91(a), which decreased the figure in the proviso at the end of the first sentence of subsection (a) from $300,000 to $100,000, shall expire on December 31, 1989.

Effect of Amendments. — Session Laws 1987, c. 635, s. 1, effective July 17, 1987, added the language beginning "or there is in existence a contract of insurance providing coverage of not less than five hundred thousand dollars ($500,000)" at the end of the first sentence of subsection (a), and in the second sentence of that subsection substituted "contract to be provided must be" for "contract shall be provided" and "authorized" for "licensed."

Session Laws 1987, c. 864, s. 90(b), effective August 14, 1987, added subsection (d).

Session Laws 1987, c. 864, s. 91(a), effective August 14, 1987, in the proviso at the end of the first sentence of subsection (a) as amended by Session Laws 1987, c. 635, substituted "one hundred thousand dollars ($100,000)" for "three hundred thousand dollars ($300,000)."

§ 95-111.13. Violations; civil penalties; appeal.

(a) Any person who violates G.S. 95-111.7(a) or (b) (Operation without certificate; operation not in accordance with Article or rules and regulations) shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250.00) for each day each device is so operated or used.

(b) Any person who violates G.S. 95-111.7(c) (Operation after refusal to issue or after revocation of certificate) or G.S. 95-111.10(c) (Reports required) or G.S. 95-111.12 (Liability insurance) shall be

subject to a civil penalty not to exceed five hundred dollars ($500.00) for each day each device is so operated or used.

(c) Any person who violates G.S. 95-111.8 (Location notice) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00) for each day any device is operated or used without the location notice having been provided.

(d) Any person who violates the provisions of G.S. 95-111.10(d) (Reports required) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00).

(e) Any person who violates G.S. 95-111.9 (Operation of unsafe device) shall be subject to a civil penalty not to exceed one thousand dollars ($1,000).

(f) In determining the amount of any penalty ordered under authority of this section, the Commissioner shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person being charged, the gravity of the violation, the good faith of the person and the record of previous violations.

(g) The determination of the amount of the penalty by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail, the person charged with the violation takes exception to the determination, in which event final determination of the penalty shall be made in an administrative proceeding and in a judicial proceeding pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act.

(h) The Commissioner may file in the office of the clerk of the superior court of the county wherein the person, against whom a civil penalty has been ordered, resides, or if a corporation is involved, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Whereupon, the clerk of said court shall enter judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice. (1985 (Reg. Sess., 1986), c. 990., s. 2.)

§ 95-111.14. Denial of permission to enter amusement device.

The owner or amusement device operator may deny any person entrance to an amusement device if he or she believes such entry may jeopardize the safety of the person desiring entry, riders or other persons. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.15. Legal representation.

It shall be the duty of the Attorney General of North Carolina, when requested, to represent the Department of Labor in actions or proceedings in connection with this Article or the rules and regulations promulgated thereunder. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.16. Authorization for similar safety and health federal-State programs.

Consistent with the requirements and conditions provided in this Article and the rules and regulations promulgated thereunder, the State, upon recommendation of the Commissioner of Labor, may enter into agreements or arrangements with appropriate federal agencies for the purpose of administering the enforcement of federal statutes and rules and regulations governing devices subject to the provisions of this Article. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.17. Confidentiality of trade secrets.

All information reported to or otherwise obtained by the Commissioner or his agents or representatives in connection with any inspection or proceeding under this Article or the rules and regulations promulgated thereunder which contains or might reveal a trade secret shall be considered confidential, except as to carrying out this Article and the rules and regulations promulgated thereunder or when it is relevant in any proceeding under the same. In any such proceeding the Commissioner or the Court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.18. Construction of Article and rules and regulations and severability.

This Article and the rules and regulations promulgated thereunder shall receive a liberal construction to the end that the welfare of the people may be protected. If any provisions of either or the application thereof to any person or circumstances is held to be invalid, such invalidity shall not affect those provisions or applications which can be given effect without the invalid provision or application, and to that end the provisions of this Article are severable. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§§ 95-112 to 95-115: Reserved for future codification purposes.

Article 15.

Passenger Tramway Safety.

§ 95-123. Orders.

If, after investigation, the Commissioner finds that a violation of any of his rules and regulations exists, or that there is a condition in passenger tramway construction, operation, or maintenance which endangers the safety of the public, the Commissioner shall forthwith issue his written order setting forth his findings, the corrective action to be taken, and fixing a reasonable time for compliance therewith. The order shall be sent to the affected operator by certified mail and shall become final unless the operator contests the order by filing a petition for a contested case under G.S. 150B-23 within 20 days after receiving the order. The Commissioner shall have the power to institute injunctive proceedings in any court of competent jurisdiction of the judicial district in which the passenger tramway is located for the purpose of restraining the operation of said tramway or for compelling compliance with any lawful order of the Commissioner. Judicial review of a final decision under this section may be obtained under Article 4 of Chapter 150B of the General Statutes. (1969, c. 1021; 1973, c. 1331, s. 3; 1987, c. 827, s. 264.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, rewrote the second and last sentences.

Article 16.

Occupational Safety and Health Act of North Carolina.

§ 95-126. Short title and legislative purpose.

CASE NOTES

Cited in Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985); Pittman v. Inco, Inc., 78 N.C. App. 134, 336 S.E.2d 637 (1985); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).

§ 95-127. Definitions.

In this Article, unless the context otherwise requires:

(3) The term "classified service" means a position included in the State Merit System of Personnel Administration subject to the laws, rules and regulations of the State Personnel Board as administered by the State Personnel Director and as set forth in Chapter 126 of the General Statutes.

(1973, c. 295, s. 2; 1987, c. 282, s. 14.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 4, 1987, deleted "1971 Cumulative Supplement to Volume 3B" at the end of subdivision (3).

CASE NOTES

Serious Violation. —

Evidence that petitioner's employee would walk along 10-inch-wide steel beams at a height of 40 to 60 feet above the ground and would perform work tasks while balanced on those beams, at no time being secured by a safety rope, presented the possibility of an accident which would carry a substantial probability of death or serious injury, and thus showed a "serious violation" within the meaning of subdivision (18). Moreover, substantial evidence supported the conclusion that the violation was "willful," that is, that it was a deliberate disregard of a duty, imposed by statute, regulation or contract, necessary to the safety of a person or property. O.S. Steel Erectors v. Brooks, — N.C. App. —, 353 S.E.2d 869 (1987).

§ 95-129. Rights and duties of employers.

CASE NOTES

Quoted in Shreve v. Duke Power Co., — N.C. App. —, 354 S.E.2d 357 (1987).

§ 95-130. Rights and duties of employees.

CASE NOTES

Quoted in Shreve v. Duke Power Co., — N.C. App. —, 354 S.E.2d 357 (1987).

Cited in Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986); Guy v. Travenol Labs., Inc., 812 F.2d 911 (4th Cir. 1987).

§ 95-131. Development and promulgation of standards; adoption of federal standards and regulations.

(a) All occupational safety and health standards promulgated under the federal act by the Secretary, and any modifications, revision, amendments or revocations in accordance with the authority conferred by the federal act or any other federal act or agency relating to safety and health and adopted by the Secretary, shall be the rules of the Commissioner of this State unless the Commissioner shall promulgate an alternative State rule or standard as effective as the federal requirement and providing safe and healthful employment in places of employment as required by the federal act and standards and regulations heretofore referred to and as provided by the Occupational Safety and Health Act of 1970. All standards and rules promulgated under the federal act by the Secretary, and any modifications, revisions, or revocations in accordance with the authority conferred by the federal act, or any other federal act or agency relating to safety and health and adopted by the Secretary, shall become effective upon the date the same are filed by the Commissioner in the Office of Administrative Hearings in accordance with G.S. 150B-59.

(1973, c. 295, s. 6; c. 476, s. 128; 1975, 2nd Sess., c. 983, s. 81; 1987, c. 285, s. 17.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective on the first day of the fourth calendar month after ratification, rewrote subsection (a). The act was ratified June 4, 1987.

CASE NOTES

Cited in O.S. Steel Erectors v. Brooks, — N.C. App. —, 353 S.E.2d 869 (1987).

§ 95-135. Safety and Health Review Board.

(c) The Board shall meet at least once each calendar quarter but it may hold call meetings or hearings upon at least three days' notice to each member by the chairman and at such time and place as the chairman may fix. The chairman shall be responsible on behalf of the Board for the administrative operations of the Board and shall appoint such hearing examiners and other employees as he deems necessary to assist in the performance of the Board's functions and fix the compensation of such employees with the approval of the Governor. The assignment and removal of hearing examiners shall be made by the Board, and any hearing examiner may be removed for misfeasance, malfeasance, misconduct, immoral conduct, incompetency, the commission of any crime, or for any other good and adequate reason as found by the Board. The Board shall give notice to such hearing examiner, along with written allegations as to the charges against him, and the same shall be heard by the Board, and its decision shall be final. The compensation of the members of the Board shall be on a per diem basis and shall be fixed by the Governor. The chairman of the Board may be paid a higher rate of compensation than the other two members of the Board. For the purpose of carrying out its duties and functions under this Article, two members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members of the Board. On matters properly before the Board the chairman may issue temporary orders, subpoenas, and other temporary types of orders subject to the subsequent review of the Board. The issuance of subpoenas, orders to take depositions, orders requiring interrogatories and other procedural matters of evidence issued by the chairman shall not be subject to review. Prior to taking any action under this subsection to set compensation, the Governor may consult with the Advisory Budget Commission.

(1973, c. 295, s. 10; c. 1331, s. 3; 1985 (Reg. Sess., 1986), c. 955, ss. 6, 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "with the approval of the Advisory Budget Commission" at the end of the fifth sentence of subsection (c) and added the last sentence of subsection (c).

§ 95-137. Issuance of citations.

CASE NOTES

Stated in O.S. Steel Erectors v. Brooks, — N.C. App. —, 353 S.E.2d 869 (1987).

§ 95-138. Civil penalties.

CASE NOTES

Fine of $1800 for a "willful-serious" violation in allowing an employee to work on steel beams 30 feet off the ground without safety nets or a safety belt was well within the established guidelines for a violation of this nature. O.S. Steel Erectors v. Brooks, — N.C. App. —, 353 S.E.2d 869 (1987).

§ 95-141. Judicial review.

Any person or party in interest who has exhausted all administrative remedies available under this Article and who is aggrieved by a final decision in a contested case is entitled to judicial review in accordance with Article 4 of Chapter 150B of the General Statutes. The Commissioner may file in the office of the clerk of the superior court of the county wherein the person, firm or corporation under order resides, or, if a corporation is involved, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Whereupon, the clerk of said court shall enter judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice. (1973, c. 295, s. 16; c. 1331, s. 3; 1987, c. 827, s. 265.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, substituted "Article 4 of Chapter 150B of the General Statutes" for "Chapter 150A as amended, of the General Statutes, the same being entitled: 'Judicial Review of Decisions of Certain Administrative Agencies'."

CASE NOTES

Stated in O.S. Steel Erectors v. Brooks, — N.C. App. —, 353 S.E.2d 869 (1987).

Article 18.

Identification of Toxic or Hazardous Substances.

Part 1. General Provisions.

§ 95-173. Short title.

Legal Periodicals. — For note, "The Hazardous Chemicals Right-to-Know Act: Letting the Public Know What's Next Door," see 64 N.C.L. Rev. 1330 (1986).

§ 95-174. Definitions.

(i) Repealed by Session Laws 1987, c. 489, s. 1, effective June 26, 1987.

(r) "NCOSHA Standard" shall mean the currently adopted Hazard Communication Standard adopted by the Occupational Safety and Health Division of North Carolina Department of Labor in 13 North Carolina Administrative Code 7C .010(a)(99) as amended. (1985, c. 775, s. 1; 1987, c. 489, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 26, 1987, deleted subsection (i), defining "Fire company," and at the end of subsection (r) substituted "as amended" for "and in effect on April 24, 1985."

Part 2. Public Safety and Emergency Response Right to Know.

§ 95-191. Hazardous Substance List.

(a) All employers who manufacture, process, use, store, or produce hazardous chemicals, shall compile and maintain a Hazardous Substance List which shall contain the following information for each hazardous chemical stored in the facility in quantities of 55 gallons or 500 pounds, whichever is greater:

(1) The chemical name or the common name used on the MSDS or container label;

(2) The maximum amount of the chemical stored at the facility at any time during a year, using the following ranges:

Class A, which shall include quantities of less than 55 gallons or 500 pounds;

Class B, which shall include quantities of between 55 gallons or 550 gallons, and quantities of between 500 pounds and 5,000 pounds; and

Class C, which shall include quantities of between 550 gallons and 5500 gallons, and quantities between 5,000 pounds and 50,000 pounds; and

Class D, which shall include quantities of greater than 5500 gallons or 50,000 pounds; and

(3) The area in the facility in which the hazardous chemical is normally stored and to what extent the chemical may be stored at altered temperature or pressure.

(b) The Hazardous Substance List shall be updated quarterly if necessary, but not less often than annually; however, if a chemical is deleted from, or added to, the Hazardous Substance List, or if the quantity changes sufficiently to cause the chemical to be in a different class as defined in subsection (a) of this section, the employer shall update the Hazardous Substance List to reflect those changes as soon as practicable, but in any event within 30 days of such change.

(b1) In lieu of the information required by subdivisions (a)(1) through (a)(3), employers may substitute the information specified in section 312(d)(2) of the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499.

(c) The Hazardous Substance List may be prepared for the facility as a whole, or for each area in a facility where hazardous chemicals are stored, at the option of the employer but shall include only chemicals used or stored in North Carolina. (1985, c. 775, s. 1; 1987, c. 489, s. 3.)

Effect of Amendments. — The 1987 amendment, effective June 26, 1987, deleted "normally used or" preceding "stored in the facility" in the introductory language of subsection (a), substituted "The maximum amount of the chemical stored at the facility at any time during a year" for "The approximate range of quantity of the chemical usually stored at the facility" at the beginning of subdivision (a)(2), and added subdivision (b1).

§ 95-194. Emergency information.

(a) An employer who normally stores at a facility any hazardous chemical in an amount of at least 55 gallons or 500 pounds, whichever is greater, shall provide the Fire Chief of the Fire Department having jurisdiction over the facility, in writing, (i) the name(s) and telephone number(s) of knowledgeable representative(s) of the employer who can be contacted for further information or in case of an emergency and (ii) a copy of the Hazardous Substance List.

(b) Each employer shall provide a copy of the Hazardous Substance List to the Fire Chief. The employer shall notify the Fire Chief in writing of any updates that occur in the previously submitted Hazardous Substance List as provided in G.S. 95-191(b).

(f) The Fire Chief shall make information from the Hazardous Substance List, the emergency response plan, and MSDS's available to members of the Fire Department having jurisdiction over the facility and to personnel responsible for preplanning emergency response, police, medical or fire activities, but shall not otherwise distribute or disclose (or allow the disclosure of) information not available to the public under G.S. 95-208. Such persons receiving such information shall not disclose the information received and shall use such information only for the purpose of preplanning emergency response, police, medical or fire activities.

(1985, c. 775, s. 1; 1987, c. 489, ss. 4-6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 26, 1987, substituted "and (ii) a copy of the Haz-

ardous Substance List" for "(ii) in municipalities with populations of less than 10,000 advise him of the availability of the Hazardous Substance List upon written request, and (iii) in municipalities with populations of 10,000 or more, a copy of the Hazardous Substance List" at the end of subsection (a), deleted "in accordance with the provisions of G.S. 95-194(a)" at the end of the first sentence of subsection (b), and in the first sentence of subsection (f) deleted "in consultation with the employer" following "The Fire Chief shall" and substituted "Fire Department" for "Fire Company."

§ 95-195. Complaints, investigations, penalties.

(a) Complaints of violations of this Part shall be filed in writing with the Commissioner of Labor. Such complaints received in writing from any Fire Chief relating to alleged violations of this Part shall be investigated in a timely manner by the Commissioner of Labor or his designated representative.

(b) Duly designated representatives of the Commissioner of Labor, upon presentation of appropriate credentials to the employer, shall have the right of entry into any facility at reasonable times to inspect and investigate complaints within reasonable limits, and in a reasonable manner. Following the investigation, the Commissioner shall make appropriate findings. Either the employer or the person complaining of a violation may request an administrative hearing pursuant to Chapter 150B of the General Statutes. This request for an administrative hearing shall be submitted to the Commissioner of Labor within 14 days following the Commissioner making his findings. The Commissioner shall within 30 days of receiving the request hold an administrative hearing in accordance with Article 3 of Chapter 150B of the General Statutes.

(c) If the Commissioner of Labor finds that the employer violated this Article, the Commissioner shall order the employer to comply within 14 days following receipt of written notification of the violation. Employers not complying within 14 days following receipt of written notification of a violation shall be subject to civil penalties of not more than one thousand dollars ($1,000) per violation imposed by the Commissioner of Labor. There shall be a separate offense for each day the violation continues.

(d) Any order by the Commissioner under subsection (b) or (c) of this section shall be subject to judicial review as provided under Article 4 of Chapter 150B of the General Statutes. (1985, c. 775, s. 1; 1987, c. 489, s. 7.)

Effect of Amendments. — The 1987 amendment, effective June 26, 1987, added the last four sentences of subsection (b), rewrote the first sentence of subsection (c), which read "Employers found to be in violation of this Article shall be given 14 days following receipt of written notification of the violation to comply," deleted "after a hearing and an opportunity to be heard" at the end of the next-to-last sentence of subsection (c), and added subsection (d).

Part 4. Implementation.

§ 95-216. Exemptions.

Notwithstanding any language to the contrary, the provisions of this Article shall not apply to chemicals in or on the following:

(1) Hazardous substances while being transported in interstate commerce into or through this State;

(2) Products intended for personal consumption by employees in the facilities;

(3) Retail food sale establishments and all other retail trade establishments in Standard Industrial Classification Codes 53 through 59, exclusive of processing and repair areas, except that the employer must comply with the provisions of G.S. 95-194(a)(i);

(4) Any food, food additive, color additive, drug or cosmetic as such terms are defined in the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.);

(5) A laboratory under the direct supervision or guidance of a technically qualified individual provided that:

a. Labels on containers of incoming chemicals shall not be removed or defaced;

b. MSDS's received by the laboratory shall be maintained and made accessible to employees and students;

c. The laboratory is not used primarily to produce hazardous chemicals in bulk for commercial purposes; and

d. The laboratory operator complies with the provisions of G.S. 95-194(a)(i);

(6) Any farming operation which employs 10 or fewer full-time employees, except that if any hazardous chemical in an amount in excess of 55 gallons or 500 pounds, whichever is greater, is normally stored at the farming operation, the employer must comply with the provisions of G.S. 95-194(a)(i); and

(7) Any distilled spirits, tobacco, and untreated wood products; and

(8) Medicines used directly in patient care in health care facilities and health care facility laboratories. (1985, c. 775, s. 1; 1987, c. 489, s. 8.)

Effect of Amendments. — The 1987 amendment, effective June 26, 1987, inserted "in Standard Industrial Classification Codes 53 through 59" in subdivision (3), deleted "is an independent operation not affiliated with a manufacturing or nonmanufacturing facility and the" preceding "operator complies" in paragraph (5)d, and deleted "are exempt from this Article" at the end of subdivision (8).

§ 95-217. Preemption of local regulations.

It is the intent of the General Assembly to prescribe this uniform system for the disclosure of information regarding the use or storage of hazardous chemicals. To that end, all units of local government in the State are preempted from exercising their powers to require disclosure, directly or indirectly, of information regarding the use or storage of hazardous chemicals by employers to any members of the public, or to any branch or agent of State or local

government in any manner other than as provided for in this Article. This section does not preempt the enforcement of the provisions of any nationally recognized fire code that may be adopted by a unit of local government. (1985, c. 775, s. 1; 1987, c. 489, s. 9.)

Effect of Amendments. — The 1987 amendment, effective June 26, 1987, added the last sentence.

Chapter 96.

Employment Security.

Article 1.

Employment Security Commission.

§ 96-2. Declaration of State public policy.

CASE NOTES

This Act does not contemplate penalizing workers who choose in favor of their own health, safety or ethical standards and against an affirmative or de facto policy of the employer to the contrary. Ray v. Broyhill Furn. Indus., 81 N.C. App. 586, 344 S.E.2d 798 (1986).

Quoted in Poteat v. Employment Sec. Comm'n, — N.C. —, 353 S.E.2d 219 (1987).

Cited in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986).

§ 96-3. Employment Security Commission.

(d) Quorum. — The chairman or his designee and three members of the Commission shall constitute a quorum. (Ex. Sess. 1936, c. 1, s. 10; 1941, c. 108, s. 10; c. 279, ss. 1-3; 1943, c. 377, s. 15; 1947, c. 598, s. 1; 1953, c. 401, s. 1; 1957, c. 541, s. 5; 1965, c. 795, s. 1; 1977, c. 727, s. 7; 1979, c. 660, s. 1; 1981, c. 354; 1983, c. 717, s. 19; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 103, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1987 amendment, effective April 27, 1987, inserted "or his designee" in subsection (d).

§ 96-4. Administration.

(c) Publication. — The Commission shall cause to be printed for distribution to the public the text of this Chapter, the Commission's regulations and general rules, and any other material the Commission deems relevant and suitable, and shall furnish the same to any person upon application therefor. All publications printed shall comply with the requirements of G.S. 143-170.1.

(t) Confidentiality of Records, Reports, and Information Obtained from Claimants and Employers.

(1) Confidentiality of Information Contained in Records and Reports. — (i) Except as hereinafter otherwise provided, it shall be unlawful for any person to obtain, disclose, or use, or to authorize or permit the use of any information which is obtained from any employing unit or individual pursuant to the administration of this Chapter. (ii) Any claimant or employer or their legal representatives shall be supplied with information from the records of the Employment Security Commission to the extent necessary for the proper presentation of claims or defenses in any proceeding under this Chapter. Notwithstanding any other provision of law, any claimant may be supplied, subject to restrictions as the Commission may by regulation prescribe, with any information contained in his payment record or on his most recent monetary determination, and any individual, as well as any interested employer, may be supplied with information as to the individual's potential benefit rights from claim records. (iii) Subject to restrictions as the Commission may by regulation provide, information from the records of the Employment Security Commission may be made available to any agency or public official for any purpose for which disclosure is required by statute or regulation. (iv) The Commission may, in its sole discretion, permit the use of information in its possession by public officials in the performance of their public duties. (v) The Commission shall release the payment and the amount of unemployment compensation benefits upon receipt of a subpoena in a proceeding involving child support.

(2) Job Service Information. — (i) Except as hereinafter otherwise provided it is unlawful for any person to disclose any information obtained by the North Carolina State Employment Service Division from workers, employers, applicants, or other persons or groups of persons in the course of administering the State Public Employment Service Program. Provided, however, that if all interested parties waive in writing the right to hold such information confidential, the information may be disclosed and used but only for those purposes that the parties and the Commission have agreed upon in writing. (ii) The Employment Service Division shall make public, through the newspapers and any other suitable media, information as to job openings and available applicants for the purpose of supplying the demand for workers and employment. (iii) The Labor Market Information Division shall collect, collate, and publish statistical and other information relating to the work under the Commission's jurisdiction; investigate

economic developments, and the extent and causes of unemployment and its remedies with the view of preparing for the information of the General Assembly such facts as in the Commission's opinion may make further legislation desirable. (iv) Except as provided by Commission regulation, any information published pursuant to this subsection (II) shall not be published in any manner revealing the identity of the applicant or the employing unit.

(3) Penalties for Disclosure or Improper Use. — Any person violating any provision of this section may be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200.00), or imprisoned for not longer than 90 days, or both.

(4) Regulations. — The Commission may provide by regulation for procedures by which requests for information will be considered and the methods by which such information may be disclosed. The Commission is authorized to provide by regulation for the assessment of fees for securing and copying information released under this section.

(5) Privileged Status of Letters and Reports and Other Information Relating to Administration of this Chapter. — All letters, reports, communication, or any other matters, either oral or written, including any testimony at any hearing, from the employer or employee to each other or to the Commission or any of its agents, representatives, or employees, which letters, reports, or other communication shall have been written, sent, delivered, or made in connection with the requirements of the administration of this Chapter, shall be absolutely privileged communication in any civil or criminal proceedings except proceedings pursuant to or involving the administration of this Chapter and except proceedings involving child support and only for the purpose of establishing the payment and amount of unemployment compensation benefits.

(6) Nothing in this subsection (t) shall operate to relieve any claimant or employing unit from disclosing any information required by this Chapter or by regulations promulgated thereunder.

(7) Nothing in this subsection (t) shall be construed to prevent the Commission from allowing any individual or entity to examine and copy any report, return, or any other written communication made by that individual or entity to the Commission, its agents, or its employees.

(u) Service of process upon the Commission in any proceeding instituted before an administrative agency or court of this State shall be pursuant to G.S. 1A-1, Rule 4(j)(4); however, notice of the requirement to withhold unemployment compensation benefits pursuant to G.S. 110-136.2(f) shall be served upon the process agent for the Employment Security Commission by regular or courier mail. (Ex. Sess. 1936, c. 1, s. 11; 1939, c. 2; c. 27, s. 8; c. 52, s. 5; cc. 207, 209; 1941, c. 279, ss. 4, 5; 1943, c. 377, ss. 16-23; 1945, c. 522, ss. 1-3; 1947, c. 326, ss. 1, 3, 4, 26; c. 598, ss. 1, 6, 7; 1949, c. 424, s. 1; 1951, c. 332, ss. 1, 18; 1953, c. 401, ss. 1-4; 1955, c. 385, ss. 1, 2; c. 479; 1957, c. 1059, s. 1; 1969, c. 44, s. 63; c. 575, ss. 1, 2; 1971, c. 673, ss. 1, 2; 1977, c. 727, ss. 8-10; 1979, c. 660, s. 2; 1979, 2nd Sess., c. 1212, s. 2; 1981, c. 160, s. 1; 1983, c. 625, s. 16; 1983 (Reg. Sess., 1984), c.

995, s. 6; 1985, c. 197, ss. 1, 6, 7; c. 552, s. 23; 1987, c. 273; c. 764, ss. 4, 4.1, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — Session Laws 1987, c. 273, effective June 3, 1987, deleted "its biennial reports to the Governor" following "the Commission's regulations and general rules," in the first sentence of subsection (c), and added the second sentence of that subsection.

Session Laws 1987, c. 764, ss. 4, 4.1 and 5, effective September 1, 1987, added clause (v) of subdivision (t)(1), inserted "and except proceedings involving child support and only for the purpose of establishing the payment and amount of unemployment compensation benefits" in the first sentence of subdivision (t)(5), and added subsection (u).

CASE NOTES

Quoted in Williams v. Burlington Indus., Inc., 318 N.C. 441, 349 S.E.2d 842 (1986).

§ 96-5. Employment Security Administration Fund.

(c) There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this Chapter subsequent to June 30, 1947 as well as any appropriations of funds by the General Assembly, shall be paid into this fund. No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the Commission for the administration of this Chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Secretary of Labor not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source and shall also be used by the Commission for: (i) extensions, repairs, enlargements and improvements to buildings, and the enhancement of the work environment in buildings used for Commission business; (ii) the acquisition of real estate, buildings and equipment required for the expeditious handling of Commission business; and (iii) the temporary stabilization of federal funds cash flow. Refunds of interest allowable under G.S. 96-10, subsection (e) shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to G.S. 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Insurance Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the Executive Budget Act (G.S. 143-1 et seq.) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds

in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this section.

(f) Employment Security Commission Reserve Fund. — There is created in the State treasury a special trust fund, separate and apart from all other public moneys or funds of this State, to be known as the Employment Security Commission Reserve Fund, hereinafter "Reserve Fund". Except as provided herein and in G.S. 96-9(b)(3)j, all proceeds from the tax as defined in G.S. 96-9(b)(3)j and collected pursuant to G.S. 96-10 shall be paid into the Reserve Fund. The moneys in the Reserve Fund may be used by the Commission for loans to the Unemployment Insurance Fund, as security for loans from the federal Unemployment Insurance Trust Fund, and to pay any interest required on advances under Title XII of the Social Security Act as required by G.S. 96-6(f), and shall be continuously available to the Commission for expenditure in accordance with the provisions of this section. The State Treasurer shall be ex officio the treasurer and custodian and shall invest said moneys in accordance with existing law as well as rules and regulations promulgated pursuant thereto. Furthermore, the State Treasurer shall disburse the moneys in accordance with the directions of the Commission and in accordance with such regulations as the Commission may prescribe.

Administrative costs for the collection of the tax and interest payable to the Reserve Fund shall be borne by the Special Employment Administration Fund. Refunds of interest and tax allowable under G.S. 96-9(b)(3)j shall be made from the Reserve Fund. No taxes shall be collected or paid into this fund during a calendar year when, as of the computation date (August 1) of the preceding calendar year, the balance of the fund equals to or exceeds one percent (1%) of the taxable wages.

The interest earned from investment of the Reserve Fund moneys shall be deposited in a fund hereby established in the State Treasurer's Office, to be known as the "Worker Training Trust Fund". These moneys shall be used to:

(1) Fund programs, specifically for the benefit of unemployed workers or workers who have received notice of long-term layoff or permanent unemployment, which will enhance the employability of workers, including, but not limited to, adult basic education, adult high school or equivalency programs, occupational skills training programs, assessment, job counseling and placement programs;
(2) Continue operation of local Employment Security Commission offices throughout the State; or
(3) Provide refunds to employers.

The use of funds from the Worker Training Trust Fund, for the purposes set out in the above paragraph, shall be pursuant to appropriations in the Current Operations Appropriations Act. Funds deposited in the Worker Training Trust Fund prior to July 1, 1987, shall be used as provided in the Current Operations Appropriations Act for 1987-89. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2; 1951, c. 332, s. 18; 1953, c. 401, ss. 1, 5; 1977, c. 727, ss. 11-13; 1981, c. 160, s. 2; 1987, c. 17, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1987, c. 108 provides that notwithstanding § 96-5(c) there is appropriated from the Special Employment Security Administration Fund to the Employment Security Commission the sum of $251,406.00 to fund the cost of collecting and administering the tax levied by § 96-9(b)(3)j as enacted by Session Laws 1987, c. 17 for the remainder of the 1986-87 fiscal year.

Effect of Amendments. — The 1987 amendment, effective January 1, 1987, inserted "as well as any appropriations of funds by the General Assembly" in the second sentence of subsection (c), and added subsection (f).

Article 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

As used in this Chapter, unless the context clearly requires otherwise:

(5) "Employer" means:

a. Any employing unit which (a) within the current or preceding calendar year, and which for some portion of a day in each of 20 different calendar weeks within such calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week); or (b) in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars ($1,500) or more. Provided further, for the purpose of this paragraph, "employment" shall include services which would constitute "employment" but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under an arrangement entered into by the Commission pursuant to subsection (*l*) of G.S. 96-4, and an agency charged with the administration of any other state or federal employment security law. Provided further, for the purpose of this paragraph, "week" means a period of seven consecutive calendar days, and when a calendar week falls partly within each of two calendar years, the days of that week up to January 1 shall be deemed one calendar week, and the days beginning January 1, another such week.

b. Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this Chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this Chapter; provided, such other would have been an employer under paragraph a of this subdivision if such part had constituted its entire organization, trade, or business; provided further, that G.S. 96-10, subsection (d), shall not be applicable to an individual or employing unit acquiring such part of the organization, trade or business. The provisions of G.S. 96-11(a) to the contrary notwithstanding, any employing unit which becomes an employer solely by virtue of the provisions of this paragraph shall not be liable for contributions based on wages paid or payable to individuals with respect to employment performed by such individuals for such employing unit prior to the date of acquisition of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this Chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this Chapter. A successor by total acquisition under the provisions of this paragraph may be relieved from coverage hereunder by making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and provided the Commission finds the predecessor was an employer at the time of such acquisition only because such predecessor had failed to make application for termination of coverage as provided in G.S. 96-11 of this Chapter. A successor under the provisions of this paragraph who becomes an employer by virtue of having acquired a part of the organization, trade or business of the predecessor hereunder may be relieved from coverage upon making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and the Commission finds that the predecessor could have terminated by making the application under G.S. 96-11 if the part acquired had constituted all of the predecessor's business.

c. Repealed by Session Laws 1985, c. 552, s. 1, effective July 1, 1985.

d. Any employing unit which, having become an employer under paragraphs a, b, or c, has not, under G.S. 96-11, ceased to be an employer subject to this Chapter; or

e. For the effective period of its election pursuant to G.S. 96-11(c) any other employing unit which has elected to become fully subject to this Chapter.

f. Any employing unit not an employer by reason of any other paragraph of this subdivision, for which within

any calendar year, services in employment are or were performed with respect to which such employing unit is or was liable for any federal tax against which credit may or could have been taken for contributions required to be paid into a State Unemployment Insurance Fund; or which as a condition for approval of this Chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required, pursuant to such act, to be an "employer" under this Chapter; or any employing unit required to be covered by the Federal Unemployment Tax Act; provided, that such employer, notwithstanding the provisions of G.S. 96-11, shall cease to be subject to the provisions of this Chapter during any calendar year if the Commission finds that during such period the employer was not subject to the provisions of the Federal Unemployment Tax Act and any other provision of this Chapter.

g. Repealed by Session Laws 1985, c. 552, s. 2, effective July 1, 1985.

h. Any employing unit which maintains an operating office within this State from which the operations of an American vessel operating on navigable waters within or within and without the United States or ordinarily and regularly supervised, managed, directed, and controlled: Provided, the employing unit would be an employer by reason of any other paragraph of this subdivision.

i. Repealed by Session Laws 1985, c. 552, s. 3, effective July 1, 1985.

j. Prior to January 1, 1978, any institution of higher education or State hospital located in this State which is an agency or instrumentality of this State, or which is owned or operated by the State or an instrumentality of this State (or by this State and one or more states or their instrumentalities), provided such employing unit, in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), or in any calendar quarter in either the current or preceding calendar year paid for services in employment wages of one thousand five hundred dollars ($1,500) or more.

For purposes of this Chapter, "institution of higher education" means an educational institution in this State which: (i) admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such certificate; (ii) is legally authorized in this State to provide a program of education beyond high school; (iii) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for credit toward such a degree or a program of training to prepare students for gainful employment

in a recognized occupation; (iv) is a public or other nonprofit institution; and (v) notwithstanding any of the foregoing provisions of this subdivision, is a university, college, or community college in the State.

For purposes of this Chapter, "State hospital" means any institution licensed by the Department of Human Resources under Chapter 22 or Chapter 131 of the General Statutes.

k. Notwithstanding any other provision of this Chapter, any nonprofit organization or a group of organizations (hereafter, where the words "nonprofit organization" are used in this Chapter, it shall include a group of nonprofit organizations), corporations, any community chest, fund, or foundation which are organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals and which is exempt or may be exempted from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954, provided such employing unit for some portion of a day in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment four or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week).

l. Repealed by Session Laws 1981, c. 160, s. 5.

m. Repealed by Session Laws 1981, c. 160, s. 6.

n. With respect to employment on and after January 1, 1978, any person or employing unit who (a) during any calendar quarter in the current calendar year or the preceding calendar year paid wages of twenty thousand dollars ($20,000) or more for agricultural labor, or (b) on each of some 20 days during the current or preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day. Provided, that with respect to agricultural labor performed by a crew on and after January 1, 1978, the crew leader shall be deemed an employer if (1) either of the requirements set forth in the first sentence of this paragraph are met; and (2) the crew members are not employed by another person within the meaning of the first sentence of this paragraph; (3) and if the crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or substantially all the members of the crew operate or maintain tractors, mechanized harvesting or crop dusting equipment, or any other mechanized equipment, which is provided by the crew leader. For purposes of this paragraph, the term "crew leader" means an individual who (1) furnishes individuals to perform agricultural labor for any other person, (2) pays (either on his behalf or on behalf of such other person) the individuals so furnished by him

for the agricultural labor performed by them, and (3) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person. The farm operator shall be deemed to be the employer of any worker hired by the farm operator; any assignment to work with a crew or under a crew leader notwithstanding. All the workers shall be deemed the employees of the farm operator when the crew leader does not qualify as the employer under the provisions set out in this paragraph.

o. With respect to employment on and after January 1, 1978, any person who during any calendar quarter in the current calendar year or the preceding calendar year paid wages in cash of one thousand dollars ($1,000) or more for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.

p. With respect to employment on and after January 1, 1978, any state and local governmental employing unit, including the State of North Carolina, a county board of education, a city board of education, the State Board of Education, the Board of Trustees of the University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, any other agency of and within the State by which a teacher or other employee is paid, and any county, incorporated city or town, the light and water board or commission of any incorporated city or town, the board of alcoholic control of any county or incorporated city or town, county and/or city airport authorities, housing authorities created and operated under and by virtue of Chapter 157 of the General Statutes, redevelopment commissions created and operated under and by virtue of Article 37, Chapter 160 of the General Statutes, county and/or city or regional libraries, county and/or city boards of health, district boards of health, any other separate, local governmental entity, jointly owned or operated governmental entities, and the Retirement System.

q. With respect to employment on and after January 1, 1978, any nonprofit elementary and secondary school. For purposes of this Chapter, "secondary school" means any school not an institution of higher education as defined in G.S. 96-8(5)j.

(6) a. "Employment" means service performed including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" includes an officer of a corporation, but such term does not include (i)

any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules. An employee who is on paid vacation or is on paid leave of absence due to illness or other reason shall be deemed to be in employment irrespective of the failure of such individual to perform services for the employing unit during such period.

b. The term "employment" shall include an individual's entire service, performed within or both within and without this State if:
   1. The service is localized in this State; or
   2. The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.
   3. The service, wherever performed, is within the United States, or Canada; such service is not covered under the unemployment compensation law of any other state or Canada; and the place from which the service is directed or controlled is in this State.

c. Services performed within this State but not covered under paragraph b of this subdivision shall be deemed to be employment subject to this Chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.

d. Services not covered under paragraph b of this subdivision, and performed entirely without this State, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this Chapter if the individual performing such service is a resident of this State and the Commission approves the election of the employing unit for whom such services are performed that the entire sevice of such individual shall be deemed to be employment subject to this Chapter, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to subsection (*l*) of G.S. 96-4 shall be deemed to be employment during the effective period of such election.

e. Service shall be deemed to be localized within a state if:
   1. The service is performed entirely within such state; or
   2. The service is performed both within and without such state, but the service performed without such

state is incidental to the individual's service within the State, for example, is temporary or transitory in nature or consists of isolated transactions.

f. The term "employment" shall include:

1. Services covered by an election pursuant to G.S. 96-11, subsection (c), of this Chapter; and
2. Services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to G.S. 96-4, subsection (*l*), of this Chapter during the effective period of such election.
3. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if such individual is employed on and in connection with such vessel when outside the United States: Provided, such service is performed on or in connection with the operations of an American vessel operating on navigable waters within or within and without the United States and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State: Provided further, that this subparagraph shall not be applicable to those services excluded in subdivision (6), paragraph k, subparagraph 6 of this section.
4. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the aircraft it touches at a port in the United States, if such individual is employed on and in connection with such aircraft when outside the United States; provided such service is performed on or in connection with the operations of an American aircraft and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State.
5. Notwithstanding any other provision of this Chapter, "employment" shall include any individual who performs services irrespective of whether the master-servant relationship exists, for remuneration for any employing unit:
   (a) As an agent-driver or commission-driver engaged in distrbuting meat products, vegetable products, fruit products, bakery products, beverages (other than milk) or laundry or drycleaning services, for his principal;

(b) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations if the contract of services contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employment" under the provisions of this subsection if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

6. Service of an individual who is a citizen of the United States, performed outside of the United States (except in Canada), in the employ of an American employer (other than service which is deemed "employment" under the provisions of paragraph (b) or (e) of this subsection or the parallel provisions of another state's law), if:
   (i) The employer's principal place of business in the United States is located in this State; or
   (ii) The employer has no place of business in the United States, but
      (I) The employer is an individual who is a resident of this State; or
      (II) The employer is a corporation which is organized under the laws of this State; or
      (III) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any other state; or
   (iii) None of the criteria of divisions (i) and (ii) of this subparagraph is met but the employer has elected coverage in this State, or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this State.
   (iv) An "American employer," for the purposes of this paragraph, means a person who is:
      (I) An individual who is a resident of the United States; or

(II) A partnership if two thirds or more of the partners are residents of the United States; or

(III) A trust, if all of the trustees are residents of the United States; or

(IV) A corporation organized under the laws of the United States or of any state;

(V) For the purposes of this subparagraph, United States includes all the states, the District of Columbia, and the Commonwealth of Puerto Rico.

7. Services with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment insurance fund, or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this Chapter.

g. On and after January 1, 1978, the term "employment" includes services performed in agricultural labor when a person or employing unit (a) during any calendar quarter in the current calendar year or the preceding calendar year pays wages of twenty thousand dollars ($20,000) or more for agricultural labor, or (b) on each of some 20 days during the preceding calendar year, each day being in a different calendar week, employs at least 10 individuals in employment in agricultural labor for some portion of the day. For purposes of this Chapter, the term "agricultural labor" includes all services performed: (1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife; (2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm; (3) in connection with the production or harvesting of crude gum (oleoresin) from a living tree, and the following products if processed by the original producer of crude gum from which derived; gum spirits of turpentine and gum resin, or in connection with the ginning of cotton or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes; or (4)(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to mar-

ket, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one half of the commodity with respect to which such service is performed; (B) in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in performance of service described in subparagraph (A), but only if such operators produced more than one half of the commodity with respect to which such service is performed. (C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; (D) on a farm operated for profit if such service is not in the course of the employer's trade or business. As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. Provided, such labor is not agricultural labor performed before January 1, 1993, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act.

h. On and after January 1, 1978, the term "employment" includes domestic service in a private home, local college club or local chapter of a college fraternity or sorority performed for a person who pays cash remuneration of one thousand dollars ($1,000) or more on or after January 1, 1978, in any calendar quarter in the current calendar year or the preceding calendar year to individuals employed in such domestic service.

i. On and after January 1, 1978, the term "employment" includes service performed for any State and local governmental employing unit. Provided, however, that employment shall not include service performed (a) as an elected official; (b) as a member of a legislative body or a member of the judiciary, of a State or political subdivision thereof; (c) as a member of the State National Guard or Air National Guard; (d) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or (e) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week. The services to which clause (d) of the preceding sentence applies include but are not limited to temporary emergency services compensated solely by a fixed payment for each emergency call answered whether or not provided for by prior agreement and training in preparation for such temporary emergency service whether or not compensated.

j. On and after January 1, 1978, the term "employment" includes services performed in any calendar year by employees of nonprofit elementary and secondary schools.

k. The term "employment" shall not include:

1. Prior to January 1, 1978, services performed in the employ of this State, or of any political subdivision thereof, or any instrumentality of this State or its political subdivisions except from and after January 1, 1972, services performed for employers as defined in G.S. 96-8(5)j, and 96-11(c)(3), and except as otherwise provided in this Chapter.

2. Except with respect to service performed for an employer as defined in G.S. 96-8(5)j, service performed prior to January 1, 1978, in the employ of any other state or its political subdivisions, or of the United States Government, or of an instrumentality of any other state or states or their political subdivisions or of the United States and service performed in the employ of the United States Government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this Chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state employment security law, all of the provisions of this Chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services: Provided, that if this State shall not be certified for any year by the Secretary of Labor under section 3304 of the Federal Internal Revenue Code of 1954, the payments required for such instrumentalities with respect to such year shall be refunded by the Commission from the fund in the same manner and within the same period as is provided in G.S. 96-10(e) with respect to contributions erroneously collected.

3. Service with respect to which unemployment insurance is payable under an employment security system established by an act of Congress: Provided, that the Commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication thereof in the manner provided in G.S. 96-4(b) for general rules, to provide potential rights to benefits under this Chapter, acquired rights to unemployment insurance under act of Congress, or who have, after acquiring potential rights to unemployment insurance, under such act

of Congress, acquired rights to benefits under this Chapter.

4. Prior to January 1, 1978, service performed in agricultural labor as defined in G.S. 96-8(6)g.
5. Prior to January 1, 1978, domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.
6. Service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft by an individual if the individual is performing services on and in connection with such vessel or aircraft when outside the United States; or, service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shell fish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by such individual as an ordinary incident to any such activity), except (i) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (ii) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the registered tonnage of merchant vessels under the laws of the United States).
7. Services performed by an individual in the employ of a son, daughter, or spouse; services performed by a child under the age of 21 in the employ of his father or mother or of a partnership consisting only of parents of the child.
8. Service performed by an individual during any calendar quarter for any employing unit or an employer as an insurance agent or as an insurance solicitor, or as a securities salesman if all such service performed during such calendar quarter by such individual for such employing unit or employer is performed for remuneration solely by way of commission; service performed by an individual for an employing unit as a real estate agent or a real estate salesman as defined in G.S. 93A-2, provided, that such real estate agent or salesman is compensated solely by way of commission and is authorized to exercise independent judgment and control over the performance of his work.
9. Services performed in employment as a newsboy or newsgirl selling or distributing newspapers or magazines on the street or from house to house.
10. Except as provided in G.S. 96-8(6)f5(a), service covered by an election duly approved by the agency charged with the administration of any other state or federal employment security law in accordance with an arrangement pursuant to subdivision (l) of G.S. 96-4 during the effective period of such election.

11. Casual labor not in the course of the employing unit's trade or business.
12. Service in any calendar quarter in the employ of any organization exempt from income tax under the provisions of section 501(a) of the Internal Revenue Code of 1954 (other than an organization described in section 401(a) of said Internal Revenue Code of 1954) or under section 521 of the Internal Revenue Code of 1954, if the remuneration for such service is less than fifty dollars ($50.00).
13. Service in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance.
14. Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers.
15. Services performed (i) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or (ii) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or (iii) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; or (iv) as a part of an unemployment work-relief or work-training program

assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training, unless a federal law, rule or regulation mandates unemployment insurance coverage to individuals in a particular work-relief or work-training program; (v) after December 31, 1971, by an inmate for a hospital in a State prison or other State correctional institution or by a patient in any other State-operated hospital, and services performed by patients in a hospital operated by a nonprofit organization shall be exempt; (vi) after December 31, 1971, in the employ of a hospital, if such service is performed by a patient of such hospital; (vii) after December 31, 1971, by an inmate of a custodial or penal institution.

16. Notwithstanding the provisions of G.S. 96-8(6)f3 and 96-8(6)k6, service performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under the arrangement with the owner or operator of such boat pursuant to which:
    (A) Such individual does not receive any cash remuneration (other than as provided in subparagraph (b)),
    (B) Such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch, and
    (C) The amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life,

    but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals. In order to preserve the State's right to collect State unemployment taxes for which a credit against federal unemployment taxes may be taken for contributions paid into a State unemployment insurance fund, this paragraph 16 shall not apply, with respect to any individual, to service during any period for which an assessment for federal unemployment taxes is made by the Internal Revenue Service pursuant to the Federal Unemployment Tax Act which assessment becomes a final determination (as defined by section 1313 of the Internal Revenue Code of 1954 as amended).

(10) Total and partial unemployment.

a. For the purpose of establishing a benefit year, an individual shall be deemed to be unemployed:

1. If he has payroll attachment but, because of lack of work during the payroll week for which he is requesting the establishment of a benefit year, he worked less than the equivalent of three customary scheduled full-time days in the establishment, plant, or industry in which he has payroll attachment as a regular employee. If a benefit year is established, it shall begin on the Sunday preceding the payroll week ending date.

2. If he has no payroll attachment on the date he reports to apply for unemployment insurance. If a benefit year is established, it shall begin on the Sunday of the calendar week with respect to which the claimant met the reporting requirements provided by Commission regulation.

b. For benefit weeks within an established benefit year, a claimant shall be deemed to be:

1. Totally unemployed, irrespective of job attachment, if his earnings for such week, including payments defined in subparagraph c below, would not reduce his weekly benefit amount as prescribed by G.S. 96-12(c).

2. Partially unemployed, if he has payroll attachment but because of lack of work during the payroll week for which he is requesting benefits he worked less than three customary scheduled full-time days in the establishment, plant, or industry in which he is employed and whose earnings from such employment (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

3. Part-totally unemployed, if the claimant had no job attachment during all or part of such week and whose earnings for odd jobs or subsidiary work (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

c. No individual shall be considered unemployed if, with respect to the entire calendar week, he is receiving, has received, or will receive as a result of his separation from employment, remuneration in the form of (i) wages in lieu of notice, (ii) accrued vacation pay, (iii) terminal leave pay, (iv) severance pay, (v) separation pay, or (vi) dismissal payments or wages by whatever name. Provided, however, if such payment is applicable to less than the entire week, the claimant may be considered to be unemployed as defined in subsections a and b of this paragraph. Sums received by any individual for services performed as an elected official who holds an elective office, as defined in G.S. 128-1.1(d), or as a member of the N. C. National Guard, as defined in G.S. 127A-3, or as a member of any reserve compo-

nent of the United States Armed Forces shall not be considered in determining that individual's employment status under this subsection.

d. An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission may by regulation otherwise prescribe.

(Ex. Sess. 1936, c. 1, s. 19; 1937, c. 448, s. 5; 1939, c. 27, ss. 11-13; c. 52, ss. 6, 7; c. 141; 1941, cc. 108, 198; 1943, c. 377, ss. 31-34; c. 552, ss. 1, 2; 1945, c. 522, ss. 5-10; c. 531, ss. 1, 2; 1947, c. 326, ss. 7-12; c. 598, ss. 1, 5, 8; 1949, c. 424, ss. 3-8½; cc. 523, 863; 1951, c. 322, s. 1; c. 332, ss. 2, 3, 18; 1953, c. 401, ss. 1, 7-11; 1955, c. 385, ss. 3, 4; 1957, c. 1059, ss. 2-4; 1959, c. 3652, ss. 2-6; 1961, c. 454, ss. 4-15; 1965, c. 795, ss. 2-5; 1969, c. 575, ss. 4-6, 15; 1971, c. 367; c. 673, ss. 5-13; c. 863; c. 1231, s. 1; 1973, c. 172, s. 1; c. 476, ss. 133, 152; c. 740, s. 2; c. 1138, ss. 1, 2; 1975, c. 226, s. 3; 1977, c. 727, ss. 14-36; 1979, c. 660, ss. 3-12; 1981, c. 160, ss. 3-12; c. 774, s. 1; 1983, c. 585, s. 20; c. 625, s. 9; c. 675; 1985, c. 57; c. 197, s. 3; c. 322, s. 1; c. 552, ss. 1-4; 1987, c. 103, ss. 2, 3; c. 212; c. 564, s. 21.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — The reference in paragraph 5j to Chapter 22 was apparently intended to be a reference to former Chapter 122, which was repealed by Session Laws 1985, c. 589, s. 1, effective January 1, 1986. See now Chapter 122C. Chapter 131, also referred to in paragraph (5)j, was repealed by Session Laws 1983, c. 775. As to health care facilities and services, see now Chapter 131E. Article 37 of Chapter 160, referred to in this section, has been transferred to Chapter 160A as Article 22, § 160A-500 et seq.

Effect of Amendments. — Session Laws 1987, c. 103, ss. 1, 2, effective April 27, 1987, substituted "Migrant and Seasonal Agricultural Worker Protection Act" for "Farm Labor Contractor Registration Act of 1963" in the second sentence of paragraph (5)n, and substituted "January 1, 1993" for "January 1, 1980" in the last sentence of paragraph (6)g.

Session Laws 1987, c. 212, effective May 18, 1987, inserted "as an elected official who holds an elective office, as defined in G.S. 128-1.1(d), or" in paragraph (10)c.

Session Laws 1987, c. 564, s. 21, effective July 6, 1987, substituted "or community college" for "community college, or technical institute" in paragraph (5)j.

CASE NOTES

III. "EMPLOYMENT" — EXAMPLES.

A magistrate is not a "member of the judiciary" under paragraph (6)i of this section for the purpose of determining unemployment insurance eligibility. Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986), cert. granted, — N.C. —, 353 S.E.2d 405 (1987).

Truck Driver. —

Findings of fact made by the Commission were not sufficient to support the conclusion of law that drivers hauling freight in a truck owned by company, other than owner-operators, were employees of the company for purposes of this Chapter. Reco Transp., Inc. v. Employment Sec. Comm'n, 81 N.C. App. 415, 344 S.E.2d 294, cert. denied, 318 N.C. 509, 349 S.E.2d 865 (1986).

§ 96-9. Contributions.

(b) Rate of Contributions. —

(1) Except as provided in subsection (d) hereof, each employer shall pay contributions with respect to employment during any calendar year prior to January 1, 1955, as required by this Chapter prior to such January 1, 1955, and each employer shall pay contributions equal to two and seven-tenths percent (2.7%) of wages paid by him during the calendar year 1955 and each year thereafter with respect to employment occurring after December 31, 1954, which shall be deemed the standard rate of contributions payable by each employer except as provided herein. Provided that except as provided in subsection (d) hereof, each employer shall pay contributions equal to two and twenty-five hundredths percent (2.25%) of wages paid by him during the calendar year 1987 and each year thereafter with respect to employment occurring after December 31, 1986, which shall be deemed the standard beginning rate of contributions payable by each employer.

(2) a. No employer's contribution rate shall be reduced below the standard rate for any calendar year unless and until his account has been chargeable with benefits throughout more than thirteen consecutive calendar months ending July 31 immediately preceding the computation date and his credit reserve ratio meets the requirements of that schedule used in the computation.

b. The Commission shall, for each year, compute a credit reserve ratio for each employer whose account has a credit balance and has been chargeable with benefits as set forth in G.S. 96-9(b)(2)a of this Chapter. An employer's credit reserve ratio shall be the quotient obtained by dividing the credit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the 36 calendar-month period ending June 30 preceding the computation date. Credit balance as used in this section means the total of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits to the account of the employer less the total benefits charged to the account of the employer for all past periods.

c. The Commission shall for each year compute a debit ratio for each employer whose account shows that the total of all his contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits is less than the total benefits charged to his account for all past periods. An employer's debit ratio shall be the quotient obtained by dividing the debit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the 36 calendar-month period ending June 30 preceding the computation date. The amount arrived at by subtracting the total amount of all contributions paid and credited

for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits of the employer from the total amount of all benefits charged to the account of the employer for such periods is the employer's debit balance.

For purposes of this subsection, the first date on which an account shall be chargeable with benefits shall be the first date with respect to which a benefit year (as defined in G.S. 96-8(17) can be established, based in whole or in part on wages paid by that employer.

No employer's contribution rate shall be reduced below the standard rate for any calendar year unless his liability extends over a period of all or part of three consecutive calendar years and, as of August 1 of the third year, his credit reserve ratio meets the requirements of that schedule used in computing rates for the following calendar year, unless the employer's liability was established under G.S. 96-8(5)b and his predecessor's account was transferred as provided by G.S. 96-9(c)(4)a.

Whenever contributions are erroneously paid into one account which should have been paid into another account or which should have been paid into a new account, that erroneous payment can be adjusted only by refunding the erroneously paid amounts to the paying entity. No pro rata adjustment to an existing account may be made, nor can a new account be created by transferring any portion of the erroneously paid amount, notwithstanding that the entities involved may be owned, operated, or controlled by the same person or organization. No adjustment of a contribution rate can be made reducing said rate below the standard rate for any period in which the account was not in actual existence and in which it was not actually chargeable for benefits. Whenever payments are found to have been made to the wrong account, refunds can be made to the entity making the wrongful payment for a period not exceeding five years from the last day of the calendar year in which it is determined that wrongful payments were made. Notwithstanding payment into the wrong account, any entity which is determined to have met the requirements to be a covered employer, whether or not the entity has had paid on the account of its employees any sum into another account, the Commission shall collect contributions at the standard rate or the assigned rate, whichever is higher, for the five years preceding the determination of erroneous payments, said five years to run from the last day of the calendar year in which the determination of liability for contributions or additional contributions is made. This paragraph shall apply to all cases arising hereunder, the question of good faith notwithstanding.

(3) a. Repealed by Session Laws 1977, c. 727, s. 39.

b. Repealed by Session Laws 1977, c. 727, s. 39.

c. Repealed by Session Laws 1977, c. 727, s. 39.

d. The applicable schedule of rates for the calendar year 1972 and thereafter shall be determined by the fund ratio resulting when the total amount available for benefits in the unemployment insurance fund, as of

the computation date, August 1, is divided by the total amount of the taxable payroll of all subject employers for the 12-month period ending June 30 preceding such computation date. Schedule A,B,C,D,E,F,G,H, or I appearing on the line opposite such fund ratio in the table below shall be applicable in determining and assigning each eligible employer's contribution rate for the calendar year immediately following the computation date.

FUND RATIO SCHEDULES

When the Fund Ratio Is: As Much As	But Less Than	Applicable Schedule
——	2.5%	A
2.5%	3.5%	B
3.5%	4.5%	C
4.5%	5.5%	D
5.5%	6.5%	E
6.5%	7.5%	F
7.5%	8.5%	G
8.5%	9.5%	H
9.5% and in excess thereof		I

Variations from the standard rate of contributions shall be determined and assigned with respect to the calendar year 1972 and thereafter, to employers whose accounts have a credit balance and who are eligible therefor according to each such employer's credit reserve ratio, and each such employer shall be assigned the contribution rate appearing in the applicable Schedule A,B,C,D,E,F,G,H, or I on the line opposite his credit reserve ratio as set forth in the Experience Rating Formula below:

EXPERIENCE RATING FORMULA

When The Credit Reserve Ratio Is: As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
——	0.8%	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.5
0.8%	1.0	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.5	2.3
1.0	1.2	2.7	2.7	2.7	2.7	2.7	2.7	2.5	2.3	2.1
1.2	1.4	2.7	2.7	2.7	2.7	2.7	2.5	2.3	2.1	1.9
1.4	1.6	2.7	2.7	2.7	2.7	2.5	2.3	2.1	1.9	1.7
1.6	1.8	2.7	2.7	2.7	2.5	2.3	2.1	1.9	1.7	1.5
1.8	2.0	2.7	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3
2.0	2.2	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1
2.2	2.4	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1	0.9
2.4	2.6	2.3	2.1	1.9	1.7	1.5	1.3	1.1	0.9	0.7
2.6	2.8	2.1	1.9	1.7	1.5	1.3	1.1	0.9	0.7	0.5
2.8	3.0	1.9	1.7	1.5	1.3	1.1	0.9	0.7	0.5	0.4
3.0	3.2	1.7	1.5	1.3	1.1	0.9	0.7	0.5	0.4	0.3
3.2	3.4	1.5	1.3	1.1	0.9	0.7	0.5	0.4	0.3	0.2

When The Credit Reserve Ratio Is: As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
3.4	3.6	1.3	1.1	0.9	0.7	0.5	0.4	0.3	0.2	0.1
3.6	3.8	1.1	0.9	0.7	0.5	0.4	0.3	0.2	0.1	0.1
3.8	4.0	0.9	0.7	0.5	0.4	0.3	0.2	0.1	0.1	0.1
4.0	4.2	0.7	0.5	0.4	0.3	0.2	0.1	0.1	0.1	0.1
4.2	4.4	0.5	0.4	0.3	0.2	0.1	0.1	0.1	0.1	0.1
4.4	4.6	0.4	0.3	0.2	0.1	0.1	0.1	0.1	0.1	0.1
4.6	4.8	0.3	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1
4.8	5.0	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
5.0 and in excess thereof		0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1

New rates shall be assigned to eligible employers effective January 1, 1972, and each January 1 thereafter in accordance with the foregoing Fund Ratio Schedule and Experience Rating Formula.

The Experience Rating Formula table in force in any particular year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

Provided that effective January 1, 1987, the Experience Rating Formula below shall be applicable and the variations from the standard beginning rate of contributions shall be determined and assigned in accordance therewith. New rates shall be assigned to eligible employers effective January 1, 1987, and each January 1 thereafter in accordance with the foregoing Fund Ratio Schedule and this Experience Rating Formula.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is: As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
	0.2%	2.70	2.70	2.70	2.70	2.70	2.70	2.50	2.30	2.10
0.2%	0.4%	2.70	2.70	2.70	2.70	2.70	2.50	2.30	2.10	1.90
0.4%	0.6%	2.70	2.70	2.70	2.70	2.50	2.30	2.10	1.90	1.70
0.6%	0.8%	2.70	2.70	2.70	2.50	2.30	2.10	1.90	1.70	1.50
0.8%	1.0%	2.70	2.70	2.50	2.30	2.10	1.90	1.70	1.50	1.30
1.0%	1.2%	2.70	2.50	2.30	2.10	1.90	1.70	1.50	1.30	1.10
1.2%	1.4%	2.50	2.30	2.10	1.90	1.70	1.50	1.30	1.10	0.90
1.4%	1.6%	2.30	2.10	1.90	1.70	1.50	1.30	1.10	0.90	0.80
1.6%	1.8%	2.10	1.90	1.70	1.50	1.30	1.10	0.90	0.80	0.70
1.8%	2.0%	1.90	1.70	1.50	1.30	1.10	0.90	0.80	0.70	0.60
2.0%	2.2%	1.70	1.50	1.30	1.10	0.90	0.80	0.70	0.60	0.50
2.2%	2.4%	1.50	1.30	1.10	0.90	0.80	0.70	0.60	0.50	0.40
2.4%	2.6%	1.30	1.10	0.90	0.80	0.70	0.60	0.50	0.40	0.30
2.6%	2.8%	1.10	0.90	0.80	0.70	0.60	0.50	0.40	0.30	0.20
2.8%	3.0%	0.90	0.80	0.70	0.60	0.50	0.40	0.30	0.20	0.15
3.0%	3.2%	0.80	0.70	0.60	0.50	0.40	0.30	0.20	0.15	0.10
3.2%	3.4%	0.70	0.60	0.50	0.40	0.30	0.20	0.15	0.10	0.09
3.4%	3.6%	0.60	0.50	0.40	0.30	0.20	0.15	0.10	0.09	0.08
3.6%	3.8%	0.50	0.40	0.30	0.20	0.15	0.10	0.09	0.08	0.07
3.8%	4.0%	0.40	0.30	0.20	0.15	0.10	0.09	0.08	0.07	0.06

When The Credit Ratio Is: As Much As	But Less Than	Rate Schedules (%)							
	A	B	C	D	E	F	G	H	I
4.0% 4.2%	0.30	0.20	0.15	0.10	0.09	0.08	0.07	0.06	0.05
4.2% 4.4%	0.20	0.15	0.10	0.09	0.08	0.07	0.06	0.05	0.04
4.4% 4.6%	0.15	0.10	0.09	0.08	0.07	0.06	0.05	0.04	0.03
4.6% 4.8%	0.10	0.09	0.08	0.07	0.06	0.05	0.04	0.03	0.02
4.8% 5.0%	0.09	0.08	0.07	0.06	0.05	0.04	0.03	0.02	0.01
5.0% 5.2%	0.08	0.07	0.06	0.05	0.04	0.03	0.02	0.01	0.01
5.2% 5.4%	0.07	0.06	0.05	0.04	0.03	0.02	0.01	0.01	0.01
5.4% 5.6%	0.06	0.05	0.04	0.03	0.02	0.01	0.01	0.01	0.01
5.6% 5.8%	0.05	0.04	0.03	0.02	0.01	0.01	0.01	0.01	0.01
5.8% 6.0%	0.04	0.03	0.02	0.01	0.01	0.01	0.01	0.01	0.01
6.0% 6.2%	0.03	0.02	0.01	0.01	0.01	0.01	0.01	0.01	0.01
6.2% 6.4%	0.02	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01
6.4% & Over	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01

e. Each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite his debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING WITH THE CALENDAR YEAR 1978

When The Debit Ratio Is: As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.9%
0.3	0.6	3.1
0.6	0.9	3.3
0.9	1.2	3.5
1.2	1.5	3.7
1.5	1.8	3.9
1.8	2.1	4.1
2.1	2.4	4.3
2.4	2.7	4.5
2.7	3.0	4.7
3.0	3.3	4.9
3.3	3.6	5.1
3.6	3.9	5.3
3.9	4.2	5.5
4.2 and over		5.7

The Rate Schedule for Overdrawn Accounts Beginning with the Calendar Year 1966 in force in any particular calendar year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

f. The computation date for all contribution rates shall be August 1 of the calendar year preceding the calendar year with respect to which such rates are effective.

g. Any employer may at any time make a voluntary contribution, additional to the contributions required un-

der this Chapter, to the fund to be credited to his account, and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as said term is used in G.S. 96-8(8). Any voluntary contributions so made by an employer within 30 days after the date of mailing by the Commission pursuant to G.S. 96-9(c)(3) herein, of notification of contribution rate contained in cumulative account statement and computation of rate, shall be credited to his account as of the previous July 31. Provided, however, any voluntary contribution made as provided herein after July 31 of any year shall not be considered a part of the balance of the unemployment insurance fund for the purposes of G.S. 96-9(b)(3) until the following July 31. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of such voluntary contribution by any employer.

h. If, within the calendar month in which the computation date occurs, the Commission finds that any employing unit has failed to file any report required in connection therewith or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report, as the case may be, within 15 days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

i. Repealed by Session Laws 1987, c. 17, s. 5, effective January 1, 1987.

j. Effective January 1, 1987, a tax shall be and is hereby imposed upon the contributions and shall be due and payable at the time and in the same manner as the contributions. For each quarter during calendar year 1987 and each calendar year thereafter, if the Reserve Fund is less than one percent (1%) of the taxable wages as determined on the computation date (August 1) of the preceding calendar year, the standard beginning tax rate and the tax rate assigned to any employer subject to either the experience rating formula table in G.S. 96-9(b)(3)d or the rate schedule for Overdrawn Accounts in G.S. 96-9(b)(3)e shall be twenty percent (20%) of the contributions due and payable. The collection of this tax, assessment of interest and penalty on unpaid taxes, filing of judgment liens, and enforcement of said liens for unpaid taxes shall be governed by the provisions of G.S. 96-10 where applicable. Any interest and penalties collected pursuant to this subsection shall be paid into the Special Employment

Security Administration Fund, and any interest or penalties refunded under this subsection shall be paid out of the Special Employment Security Administration Fund. Except as to taxes unpaid on the date on which they are due and payable, this tax shall not be collectible for any calendar year, if, as of the computation date (August 1) of the preceding year, the balance of the Employment Security Commission Reserve Fund equals to or exceeds one percent (1%) of the taxable wages.

(c) (1) Except as provided in subsection (d) of this section, the Commission shall maintain a separate account for each employer and shall credit his account with all voluntary contributions made by him and all other contributions which he has paid or is paid on his behalf, provided the Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all voluntary contributions paid with respect to periods prior to January 1, 1984, and of all other contributions paid with respect to periods between July 1, 1965, and December 31, 1983. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this Act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.

(2) Charging of benefit payments. —

a. Benefits paid shall be allocated to the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c,

and 96-12(e)G. The amount so allocated shall be multiplied by one hundred twenty percent (120%) and charged to that employer's account. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the voluntary leaving of work by the claimant without good cause attributable to the employer; (ii) the discharge of claimant for misconduct in connection with his work; (iii) the discharge of the claimant for substantial fault as that term may be defined in G.S. 96-14; (iv) the discharge of the claimant solely for a bona fide inability to do the work for which he was hired but only where the claimant was hired pursuant to a job order placed with a local office of the Commission for referrals to probationary employment (with a probationary period no longer than 100 days), which job order was placed in such circumstances and which satisfies such conditions as the Commission may by regulation prescribe and only to the extent of the wages paid during such probationary employment; (v) separations made disqualifying under G.S. 96-14(2B) and (6A); or (vi) separation due to involuntary leaving for disability or health condition shall not be charged to the account of the employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished work to an individual who, because of the loss of employment with one or more other employers, becomes eligible for partial benefits while still being furnished work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

No benefit charges shall be made to the account of any employer where benefits are paid as a result of a decision by an Adjudicator, Appeals Referee or the Commission if such decision to pay benefits is ultimately reversed; nor shall any such benefits paid be deemed to constitute an overpayment under G.S. 96-18(g)(2), the provisions thereof notwithstanding."

c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in

G.S. 96-13[(a)](3) shall not be charged to the account of the base period employer(s).

d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):
   1. The benefits are paid for unemployment due directly to a major natural disaster, and
   2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
   3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.

e. 1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to the experience rating account of any employer.
   2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(3) As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each employer's account and shall furnish him with a statement of all charges and credits thereto. At the same time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination prior to May 1 following the effective date of such rates. The Commission may redetermine on its own motion within the same period of time.

(4) Transfer of account. —

a. Whenever any individual, group of individuals, or employing unit, who or which, in any manner succeeds to or acquires substantially all or a distinct and severable portion of the organization, trade, or business of another employing unit as provided in G.S. 96-8, subdivision (5), paragraph b, the account or that part of the account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition of the business to the successor employer for use in the determination of his rate of contribu-

tions, provided application for transfer is made within 60 days after the Commission notifies the successor of his right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision.

b. Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this Chapter prior to the date of acquisition of the business, his rate of contribution for the period from such date to the end of the then current contribution year shall be the same as his rate in effect on the date of such acquisition. If the successor was not an employer prior to the date of the acquisition of the business he shall be assigned a standard rate of contribution set forth in G.S. 96-9(b)(1) for the remainder of the year in which he acquired the business of the predecessor; however, if such successor makes application for the transfer of the account within 60 days after notification by the Commission of his right to do so and the account is transferred, he shall be assigned for the remainder of such year the rate applicable to the predecessor employer or employers on the date of acquisition of the business, provided there was only one predecessor or if more than one and the predecessors had identical rates. In the event the rates of the predecessor were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of acquisition of the business.

Irrespective of any other provisions of this Chapter, when an account is transferred in its entirety by an employer to a successor, the transferring employer shall thereafter pay the standard rate of contributions of two and seven-tenths percent (2.7%) and shall continue to pay at such rate until he qualifies for a reduction, reacquires the account he transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3). However, when an account is transferred in its entirety by an employer to a successor on or after January 1, 1987, the transferring employer shall thereafter pay the standard beginning rate of contributions of two and twenty-five hundredths percent (2.25%) and shall continue to pay at such rate until he qualifies for a reduction, reacquires the account he transferred or acquires

the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3).

c. In those cases where the organization, trade, or business of a deceased person, or insolvent debtor is taken over and operated by an administrator, administratrix, executor, executrix, receiver, or trustee in bankruptcy, such employing units shall automatically succeed to the account and rate of contribution of such deceased person, or insolvent debtor without the necessity of the filing of a formal application for the transfer of such account.

(5) In the event any employer subject to this Chapter ceases to be such an employer, his account shall be closed and the same shall not be used in any future computation of such employer's rate nor shall any period prior to the effective date of the termination of such employer during which benefits were chargeable be considered in the application of G.S. 96-9(b)(2) of this Chapter.

(h)

(1) Any nonprofit organization which has been paying contributions on a reimbursement basis for at least three consecutive calendar years during none of which years the benefit charges exceeded four tenths of one percent (.4%) of its taxable payroll may, before November 1 of the fourth or subsequent calendar year, elect to pay contributions by special reimbursement on the basis provided for in subdivision (2) below but only upon the following conditions:

a. Benefit charges in the year of election are less than four tenths of one percent (.4%) of taxable payroll.

b. The election shall apply to no less than the four calendar years following the year of election unless terminated by the Commission under subdivision (3) below.

c. All reimbursements during the year of election and the three preceding years were paid when due.

d. The election of special reimbursement shall not entitle the electing nonprofit organization to any refund of any portion of its account balance.

e. No later than January 1 of the first year to which its election applies, the electing nonprofit organization shall furnish the Commission a letter of credit in an amount equal to one hundred fifty percent (150%) of the account balance required under subdivision (2) below.

f. The Commission shall by regulation prescribe the form of the letter of credit and the criteria for the financial institution issuing such letter of credit along with the form of election under this section.

(2) Any qualified nonprofit organization that meets the conditions of subdivision (1) above shall, upon the approval of its election by the Commission, pay contributions by special reimbursement as follows:

a. The organization's account shall have a required minimum balance that shall be computed on August 1 of each calendar year for the following calendar year and shall be equal to the greater of:

1. One-half the largest amount of claims charged to it during any of the three calendar years preceding the computation date; or,
2. One-tenth of one percent (0.1%) of the highest total taxable payroll during any of the three calendar years preceding the computation date.

b. On the first day of each quarter of any calendar year, the Commission shall bill the employer for an amount necessary to bring its account to the required minimum balance, and the amount so billed is due no later than 25 days after the bill is mailed.

(3) If any electing organization shall fail to make any quarterly payment when due:

a. The Commission may draw the full amount of the letter of credit for application to the employer's account;

b. The organization's required minimum balance shall immediately and without notice become the greater of:
1. A sum equal to its current minimum balance plus the full amount of the current letter of credit; or
2. A sum equal to five tenths of one percent (.5%) of its total taxable payroll. Any amount necessary, after the application of any funds drawn from the letter of credit, to bring the employer's account to such balance shall be payable upon demand.

c. If, after demand, the organization shall fail to pay any sums required under paragraph b. above, the Commission may revoke the organization's election for special reimbursement and any difference between the employer's account balance and one percent (1%) of its total taxable payroll shall become immediately due and payable.

d. The Commission may, in addition, exercise any of the powers granted to it in G.S. 96-10 to collect any amount due.

e. Pursuant to such regulations as the Commission may adopt, the Commission shall afford any organization affected by this paragraph a hearing to determine if any increase in the organization's minimum required balance should be reduced, in whole or in part, or if any revocation of a special reimbursement election should be rescinded. If the Commission, in its sole discretion, is satisfied that the conditions giving rise to the increase or revocation have been corrected, it may reduce such increase or rescind such revocation provided that it may require as a condition of such reduction or recision a new letter of credit up to three times the amount normally required.

f. When used in the subsection, "total taxable payroll" means the highest total taxable payroll during the three most recent, completed calendar years. (Ex. Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11; 1959, c. 362, ss. 7, 8; 1965, c. 795, ss. 6-10; 1969,

c. 575, ss. 7, 8; 1971, c. 673, ss. 14-20; 1973, c. 172, ss. 2, 3; c. 740, s. 1; 1977, c. 727, ss. 37-49; 1979, c. 660, ss. 13-15; 1981, c. 160, ss. 13-15; c. 534; 1983, c. 585, ss. 1-11; 1985, c. 552, ss. 5-7, 13; 1987, c. 17, ss. 3-7; c. 197.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. —

Session Laws 1987, c. 108 provides that notwithstanding § 96-5(c) there is appropriated from the Special Employment Security Administration Fund to the Employment Security Commission the sum of $251,406 to fund the cost of collecting and administering the tax levied by § 96-9(b)(3)j as enacted by Session Laws 1987, c. 17 for the remainder of the 1986-87 fiscal year.

Effect of Amendments. — Session Laws 1987, c. 17, ss. 3-7, effective January 1, 1987, added the last sentence of subdivision (b)(1); added the final paragraph of paragraph (b)(3)d, and the experience rating formula table at the end of paragraph (b)(3)d; deleted paragraph (b)(3)i; added paragraph (b)(3)j; and added the last sentence of the final paragraph of paragraph (c)(4)b.

Session Laws 1987, c. 197, effective January 1, 1988, added subsection (h).

§ 96-12. Benefits.

(b) (1) a. Repealed by Session Laws 1977, c. 727, s. 52.

b. Each eligible individual whose benefit year begins on or after the first day of October, 1974, who is totally unemployed as defined by G.S. 96-8(10)a, and who files a valid claim, shall be paid benefits with respect to such week or weeks at a rate per week equal to the amount obtained by dividing such individual's high-quarter wages paid during his base period by 26, rounded to the nearest dollar, but shall not be less than fifteen dollars ($15.00).

Each eligible individual whose benefit year begins on or after the first day of October 1983, who is totally unemployed as defined by G.S. 96-8(10), and who files a valid claim, shall be paid benefits with respect to such week or weeks at a rate equal to the amount obtained by dividing the sum of the wages paid to such individual during his two highest paid base period quarters by 52 and, if the amount so obtained is not a multiple of one dollar, rounded to the next lower whole dollar; provided that if the amount so obtained, after rounding, is less than fifteen dollars ($15.00), no benefits shall be paid.

c. Repealed by Session Laws 1981, c. 160, s. 17.

(2) Each August 1, a maximum weekly benefit amount available to an eligible individual whose benefit year begins on October 1, 1974, or thereafter, shall be determined by multiplying the average weekly insured wage, obtained in accordance with G.S. 96-8(22), by two thirds rounded, if not a multiple of one dollar, to the next lower dollar. Effective August 1, 1987, the maximum weekly benefit amount shall be computed as sixty-three percent (63%) of the average weekly insured wage. Thereafter, beginning August 1, 1988, the maximum weekly benefit amount shall be computed as sixty-six and two-thirds percent ($66^2/_3\%$) of the average weekly insured wage. The maximum rate applica-

ble to each claimant shall be that rate in effect during the time the claimant's benefit year is established.

(3) Repealed by Session Laws 1981, c. 160, s. 18.

(4) Qualifying Wages for Second Benefit Year. — Any individual whose prior benefit year has expired and who files a claim for benefits on and after January 1, 1972, shall not be entitled to benefits unless he has been paid qualifying wages required by G.S. 96-12(b)(1), and since the beginning date of his last established previous benefit year and before the date upon which he files his new benefit claim has been paid wages equal to at least 10 times the weekly benefit amount of the new benefit year claim. Such wages must have been earned with an employer subject to the provisions of this Chapter or some other state employment security law or in federal service as defined in Chapter 85, Title 5, United States Code.

(e) Extended Benefits. — Effective January 1, 1972, extended benefits shall be paid under this Chapter as herein specified:

A. Definitions. — As used in this subsection, unless the context clearly requires otherwise —

(1) "Extended benefit period" means a period which:

(a) Begins the third week after a week for which there is an "on" indicator; and

(b) Ends with either of the following weeks, whichever occurs later:

(I) The third week after the first week for which there is an "off" indicator; or

(II) The 13th consecutive week of such period.

Provided, that no extended benefit period may begin before the 14th week following the end of a prior extended benefit period which was in effect with respect to this State.

(2) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1178, s. 4.

(3) Repealed by Session Laws 1982 (Regular Session, 1982), c. 1178, s. 5.

(4) There is an "on indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediate preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and equalled or exceeded five percent (5%), or

b. Equalled or exceeded six percent (6%).

(5) There is an "off indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Was less than one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and was less than six percent (6%), or

b. Was less than five percent (5%).

(6) "Rate of insured unemployment," for the purposes of subparagraphs (4) and (5) of this subsection, means the percentage derived by dividing

a. The average weekly number of individuals filing claims for regular compensation in this State for weeks of unemployment with respect to the most recent 13 consecutive-week period, as determined by the Commission on the basis of its reports to the United States Secretary of Labor, by

b. The average monthly employment covered under this Chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.

(7) "Regular benefits" means benefits payable to an individual under this Chapter or any other State law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) other than extended benefits.

(8) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.

(9) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

(10) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:

a. Has received, prior to such week, all of the regular benefits that were available to him under this Chapter or any other State law (including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. Chapter 85) in his current benefit year that includes such week;

Provided, that, for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to him although (1) as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (2) he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in G.S. 96-16; or

b. His benefit year having expired prior to such week, has no, or insufficient, wages on the basis of which he could establish a new benefit year that would include such week; and

c. (1) Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and

(2) Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law, he is considered an exhaustee.

(11) "State law" means the unemployment insurance law of any state approved by the United States Secretary of Labor under section 3304 of the Internal Revenue Code of 1954.

B. Effect of State Law Provisions Relating to Regular Benefits on Claims for, and for Payment of, Extended Benefits. — Except when the result would be inconsistent with the other provisions of this section, as provided in the regulations of the Commission, the provisions of this Chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

C. Eligibility Requirements for Extended Benefits. — An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the Commission finds that with respect to such week:

1. He is an "exhaustee" as defined in subsection A(10).

2. He has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, however, that for purposes of disqualification for extended benefits for weeks of unemployment beginning after March 31, 1981, the term "suitable work" means any work which is within the individual's capabilities to perform if: (i) The gross average weekly remuneration payable for the work exceeds the sum of the individual's weekly extended benefit amount plus the amount, if any, of supplemental unemployment benefits (as defined in section 501(C)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and (ii) the gross wages payable for the work equal the higher of the minimum wages provided by section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended (without regard to any exemption), or the State minimum wage; and (iii) the work is offered to the individual in writing and is listed with the State employment ser-

vice; and (iv) the considerations contained in G.S. 96-14(3) for determining whether or not work is suitable are applied to the extent that they are not inconsistent with the specific requirements of this subdivision; and (v) the individual cannot furnish evidence satisfactory to the Commission that his prospects for obtaining work in his customary occupation within a reasonably short period of time are good, but if the individual submits evidence which the Commission deems satisfactory for this purpose, the determination of whether or not work is suitable with respect to such individual shall be made in accordance with G.S. 96-14(3) without regard to the definition contained in this subdivision. Provided, further, that no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions set forth in this subdivision, but the employment service shall refer any individual claiming extended benefits to any work which is deemed suitable hereunder. Provided, further, that any individual who has been disqualified for voluntarily leaving employment, being discharged for misconduct or substantial fault, or refusing suitable work under G.S. 96-14 and who has had the disqualification terminated, shall have such disqualification reinstated when claiming extended benefits unless the termination of the disqualification was based upon employment subsequent to the date of the disqualification.

3. After March 31, 1981, he has not failed either to apply for or to accept an offer of suitable work, as defined in G.S. 96-12(e)C.2., to which he was referred by an employment office of the Commission, and he has furnished the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work. If an individual is found to be ineligible hereunder, he shall be ineligible beginning with the week in which he either failed to apply for or to accept the offer of suitable work or failed to furnish the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work and such individual shall continue to be ineligible for extended benefits until he has been employed in each of four subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than four times his weekly benefit amount.

D. Weekly Extended Benefit Amount. — The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, the weekly extended benefit amount shall be the average of such weekly benefit amounts rounded to the nearest lower full dollar amount (if not a full dollar amount). Provided, that for any week during a period in which federal pay-

ments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be reduced by a percentage equivalent to the percentage of the reduction in the federal payment. The reduced weekly extended benefit amount, if not a full dollar amount, shall be rounded to the nearest lower full dollar amount.

E. Total Extended Benefit Amount. —

(a) Except as provided in subparagraph (b) hereof, the total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

1. Fifty percent (50%) of the total amount of regular benefits which were payable to him under this Chapter in his applicable benefit year; or
2. Thirteen times his weekly benefit amount which was payable to him under this Chapter for a week of total unemployment in the applicable benefit year.

Provided, that during any fiscal year in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the total extended benefit amount payable to an individual with respect to his applicable benefit year shall be reduced by an amount equal to the aggregate of the reductions under G.S. 96-12(e)D and the weekly amounts paid to the individual.

(b) Notwithstanding any other provisions of this Chapter, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that such individual would, but for this subparagraph, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year, multiplied by the individual's weekly benefit amount for extended benefits.

F. Beginning and Termination of Extended Benefit Period. —

1. Whenever an extended benefit period is to become effective in this State as a result of an "on" indicator, or an extended benefit period is to be terminated in this State as a result of an "off" indicator, the Commission shall make an appropriate public announcement; and
2. Computations required by the provisions of subsection A(6) shall be made by the Commission, in accordance with regulations prescribed by the United States Secretary of Labor.

G. Prior to January 1, 1978, any extended benefits paid to any claimant under G.S. 96-12(e) shall not be charged to the account of the base period employer(s) who pay taxes as required by this Chapter. However, fifty percent (50%) of any such benefits paid shall be allocated as provided in G.S. 96-9(c)(2)a (except that G.S. 96-9(c)(2)b shall not apply), and the applicable amount shall be charged to the account of the appropriate employer paying on a reimbursement basis in lieu of taxes.

On and after January 1, 1978, the federal portion of any extended benefits shall not be charged to the account of any employer who pays taxes as required by this Chapter but the State portion of such extended benefits shall be charged to the account of such employer. All state portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers.

H. Notwithstanding the provisions of G.S. 96-9(d)(1)a, 96-9(d)(2)c, 96-12(e)G, or any other provision of this Chapter, any extended benefits paid which are one hundred percent (100%) federally financed shall not be charged in any percentage to any employer's account.

I. For weeks of unemployment beginning on or after June 1, 1981, a claimant who is filing an interstate claim under the interstate benefit payment plan shall be eligible for extended benefits for no more than two weeks when there is an "off indicator" in the state where the claimant files.

(Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339; 1959, c. 362, ss. 12-15; 1961, c. 454, ss. 17, 18; 1965, c. 795, ss. 15, 16; 1969, c. 575, s. 9; 1971, c. 673, ss. 25, 26; 1973, c. 1138, ss. 3-7; 1975, c. 2, ss. 1-5; 1977, c. 727, s. 52; 1979, c. 660, ss. 18, 19; 1981, c. 160, ss. 17-23; 1981 (Reg. Sess., 1982), c. 1178, ss. 3-14; 1983, c. 585, ss. 12-16; c. 625, ss. 1, 7; 1985, c. 552, s. 9; 1985 (Reg. Sess., 1986), c. 918; 1987, c. 17, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Session Laws 1987, c. 108 provides that notwithstanding § 96-5(c) there is appropriated from the Special Employment Security Administration Fund to the Employment Security Commission the sum of $251,406 to fund the cost of collecting and administering the tax levied by § 96-9(b)(3)j as enacted by Session Laws 1987, c. 17 for the remainder of the 1986-87 fiscal year.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last two sentences of subdivision (e)D and added the last sentence of paragraph (e)E(a).

The 1987 amendment substituted the present second and third sentences of subdivision (b)(2) for a former second sentence thereof, relating to the maximum weekly benefit amount.

§ 96-14. Disqualification for benefits.

CASE NOTES

I. GENERAL CONSIDERATION.

This Act does not contemplate penalizing workers who choose in favor of their own health, safety or ethical standards and against an affirmative or de facto policy of the employer to the contrary. Ray v. Broyhill Furn. Indus., 81 N.C. App. 586, 344 S.E.2d 798 (1986).

Construction. —

Provisions of the Act which impose disqualifications for its benefits must be strictly construed in favor of the claimant. Poteat v. Employment Sec. Comm'n, 82 N.C. App. 138, 345 S.E.2d 238 (1986), aff'd in part and rev'd in part, 319 N.C. 201, 353 S.E.2d 219 (1987).

Burden of Proof. —

The burden is on the employer to show circumstances which disqualify the claimant. Umstead v. Employment Sec. Comm'n, 75 N.C. App. 538, 331 S.E.2d 218, cert. denied, 314 N.C. 675, 336 S.E.2d 405, 337 S.E.2d 853 (1985).

Effect of Filing Prematurely. — While Subdivision (1) of this section sets "the time such claim is filed" as determinative in assessing disqualification thereunder, the fact that a claim was filed during the four-day period during which employee could have continued to work for employer and thus was disqualified would not function to deny him benefits after that four-day period, when he was involuntarily unemployed through no fault of his own. Poteat v. Employment Sec. Comm'n, — N.C. —, 353 S.E.2d 219 (1987).

II. LEAVING WORK VOLUNTARILY WITHOUT GOOD CAUSE.

"Good Cause" Defined. —

In accord with the 2nd paragraph in the main volume. See Ray v. Broyhill Furn. Indus., 81 N.C. App. 586, 344 S.E.2d 798 (1986).

"Attributable to the Employer." —

Cause "attributable to the employer" is one which is produced, caused, created or as a result of actions by the employer. It also includes inaction by the employer. Ray v. Broyhill Furn. Indus., 81 N.C. App. 586, 344 S.E.2d 798 (1986).

An individual's decision to leave work, etc. —

In accord with the main volume. See Poteat v. Employment Sec. Comm'n, 82 N.C. App. 138, 345 S.E.2d 238 (1986), aff'd in part and rev'd in part, 319 N.C. 201, 353 S.E.2d 219 (1987).

Fact that claimant left work after being told that he would be terminated four days in the future did not bar claimant from receiving benefits. Poteat v. Employment Sec. Comm'n, 82 N.C. App. 138, 345 S.E.2d 238 (1986), aff'd in part and rev'd in part, 319 N.C. 201, 353 S.E.2d 219 (1987), decided prior to 1985 amendment.

Showing by Claimant Who Resigns for Health Reasons. — A claimant who resigns for health reasons need not produce a physician's note on or before the day she leaves. Rather, the claimant must only show by competent evidence that the health condition existed at the time of the leaving. Ray v. Broyhill Furn. Indus., 81 N.C. App. 586, 344 S.E.2d 798 (1986).

An employee who quits a job upon being informed that he will be terminated four days later, and who applies immediately for unemployment benefits, is disqualified for the four-day period during which he could have continued to work. Nothing else appearing, however, he is not thereby disqualified subsequent to the date on which his employment would in any event have terminated. Poteat v. Employment Sec. Comm'n, — N.C. —, 353 S.E.2d 219 (1987).

III. MISCONDUCT.

Conversion of Employer's Surplus Property. — Where the Commission found as facts that claimants had participated in a sale of their employer's surplus property without specific approval or authorization by the employer, that claimants never attempted to see that the employer received the proceeds of the sale, and that claimants knew or should have known that converting their employer's property to their own benefit was not permitted, the Commission logically concluded that claimants' conduct was misconduct connected with their work as defined by case law and properly decided that claimants were disqualified from unemployment benefits. Vanhorn v. Bassett Furn. Indus.,

Inc., 76 N.C. App. 377, 333 S.E.2d 309 (1985).

An employee's conduct in not reporting directly to his supervisor, replying that he needed at least an hour to go over some papers on his desk, did not rise to the level of culpability required for a finding of "misconduct," considering the supervisor's admission that there was very little by way of information that he had to convey, that there was no urgent need for an immediate meeting, and that he could have conveyed the information by telephone. State v. Field, 75 N.C. App. 647, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Evidence that employee left work early and without permission three days in a row, on grounds that his job was finished and he did not wish to disturb his supervisor at home at an early hour, and that he falsified his time records for these days, was sufficient to support the referee's conclusion that the employee was discharged for misconduct. Williams v. Burlington Indus., Inc., 318 N.C. 441, 349 S.E.2d 842 (1986).

An employee who had a good faith cause for leaving work early without permission, not notifying his supervisor and entering hours into his time record that he did not actually work (i.e., he completed his work and was tired, he didn't want to disturb his supervisor at home early in the morning, and he entered his time before his work day and forgot to later correct it), did not demonstrate a willful and deliberate disregard of company policy or an unwillingness to work which would disqualify him from unemployment insurance benefits. Williams v. Burlington Indus., Inc., 75 N.C. App. 273, 330 S.E.2d 657, cert. granted, 314 N.C. 549, 335 S.E.2d 28 (1985).

Substantial Fault Not Rising to Level of Misconduct. — The personal financial mismanagement of claimant, a legal secretary, constituted substantial fault connected with her work not rising to the level of misconduct for which she could be terminated, as the actions of the claimant, though unintentional and occurring primarily away from her work, had the effect of posing a serious threat to the reputation of her employer, the integrity of his law practice, and his relationship with clients and associates. Smith v. Spence & Spence, Att'ys, 80 N.C. App. 636, 343 S.E.2d 256, cert. denied and appeal dismissed, 317 N.C. 707, 347 S.E.2d 440 (1986), affirming the decision of the Commission to disqualify the secretary from receiving unemployment benefits for a period of four weeks.

Misconduct Not Shown. — A worker's failure to notify his employer why he is absent from work cannot be regarded as "misconduct" or "fault" under the Employment Security Law, when the worker is unable to given notice because he is in the hospital with a broken back, and when the employer already has knowledge of his whereabouts and condition anyway. Facet Enters., Inc. v. Deloatch, 83 N.C. App. 495, 350 S.E.2d 906 (1986).

§ 96-15. Claims for benefits.

CASE NOTES

The scope of judicial review, etc. — The scope of appellate court review of decisions of the Commission is a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law. Reco Transp., Inc. v. Employment Sec. Comm'n, 81 N.C. App. 415, 344 S.E.2d 294, cert. denied, 318 N.C. 509, 349 S.E.2d 865 (1986).

Conclusiveness of Findings of Fact, etc. —

In accord with 5th paragraph in main volume. See Vanhorn v. Bassett Furn. Indus., Inc., 76 N.C. App. 377, 333 S.E.2d 309 (1985).

Remand Where Findings of Fact, etc. —

Where there is no finding as to a material fact which is necessary for a proper determination of a case, the case must be remanded to the Commission to make a proper finding. Williams v. Burlington Indus., Inc., 75 N.C. App. 273, 330 S.E.2d 657, cert. granted, 314 N.C. 549, 335 S.E.2d 28 (1985).

Where the appeals referee made all of the necessary findings of material fact, but reached the wrong legal conclusion, it was error for the Com-

mission to remand the case for a second, subsequent hearing before the appeals referee. Williams v. Burlington Indus., Inc., 75 N.C. App. 273, 330 S.E.2d 657, cert. granted, 314 N.C. 549, 335 S.E.2d 28 (1985).

Remand by Deputy Commissioner. — Where the findings of the referee and the record together were insufficient to resolve certain issues in either party's favor, the deputy commissioner did not abuse his discretion in remanding for a new hearing. Williams v. Burlington Indus., Inc., 318 N.C. 441, 349 S.E.2d 842 (1986).

The Court of Appeals had authority to review deputy commissioner's decision to remand case for a second hearing. Williams v. Burlington Indus., Inc., 318 N.C. 441, 349 S.E.2d 842 (1986).

Applied in Facet Enters., Inc. v. Deloatch, 83 N.C. App. 495, 350 S.E.2d 906 (1986).

Cited in Umstead v. Employment Sec. Comm'n, 75 N.C. App. 538, 331 S.E.2d 218 (1985).

§ 96-15.1. Protection of witnesses from discharge, demotion, or intimidation.

(a) No person may discharge, demote, or threaten any person because that person has testified or has been summoned to testify in any proceeding under the Employment Security Act.

(b) Any person who violates the provisions of this section shall be liable in a civil action for reasonable damages suffered by any person as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the party claiming a violation to prove a claim under this section.

(c) The General Court of Justice shall have jurisdiction over actions under this section.

(d) The statute of limitations for actions under this section shall be one year pursuant to G.S. 1-54. (1987, c. 532, s. 1.)

Editor's Note. — Session Laws 1987, c. 532, s. 3 makes this section effective upon ratification. The act was ratified July 1, 1987.

§ 96-15.2. Protection of witness before the Employment Security Commission.

If any person shall by threats, menace, or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any proceeding brought under the Employment Security Act, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such proceeding, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1987, c. 532, s. 2.)

Editor's Note. — Session Laws 1987, c. 532, s. 3 makes this section effective upon ratification. The act was ratified July 1, 1987.

§ 96-18. Penalties.

(g)(1) Any person who, under subsection (e) above, has been held ineligible for benefits and who, because of those same acts or omissions has received any sum as benefits under this Chapter to which he was not entitled, shall be liable, for 10 years after the decision under subsection (e) becomes final, to repay any such sum to the Commission as provided in subparagraph (3) below, provided such decision under subsection (e) has been made within two years of the last such act or omission.

(2) Any person who has received any sum as benefits under this Chapter by reason of the nondisclosure or misrepresentation by him or by another of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) or has been paid benefits to which he was not entitled for any reason (including errors on the part of any representative of the Commission) other than subparagraph (1) above shall be liable to repay such sum to the Commission as provided in subparagraph (3) below, provided no such recovery or recoupment of such sum may be initiated after three years from the last day of the year in which the overpayment occurred.

(3) The Commission may collect the overpayments provided for in this subsection by one or more of the following procedures as the Commission may, except as provided herein, in its sole discretion choose:

a. If, after due notice, any overpaid claimant shall fail to repay the sums to which he was not entitled, the amount due may be collected by civil action in the name of the Commission, and the cost of such action shall be taxed to the claimant. Civil actions brought under this section to collect overpayments shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this Chapter.

b. If any overpayment recognized by this subsection shall not be repaid within 30 days after the claimant has received notice and demand for same, and after due notice and reasonable opportunity for hearing (if a hearing on the merits of the claim has not already been had) the Commission, under the hand of its Chairman, may certify the same to the clerk of the superior court of the county in which the claimant resides or has property, and additional copies of said certificate for each county in which the Commission has reason to believe such claimant has property located; such certificate and/or copies thereof so forwarded to the clerk of the superior court shall immediately be docketed and indexed on the cross index of judgments, and from the date of such docketing shall constitute a preferred lien upon any property which said claimant may own in said county, with the same force and effect as a judgment rendered by the superior court. The Commission shall forward a copy of said

certificate to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission, and when so forwarded and in the hands of such sheriff or agent of the Commission, shall have all the force and effect of an execution issued to such sheriff or agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. The Commission is further authorized and empowered to issue alias copies of said certificate or execution to the sheriff or sheriffs of such county or counties, or a duly authorized agent of the Commission in all cases in which the sheriff or duly authorized agent has returned an execution or certificate unsatisfied; when so issued and in the hands of the sheriff or duly authorized agent of the Commission, such alias shall have all the force and effect of an alias execution issued to such sheriff or duly authorized agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing one written notice with the Commission, the sheriff of any county shall have the sale and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case, no agent of the Commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution or alias execution, shall be made to the Commission, together with all moneys collected thereunder, and when such order, execution or alias is referred to the agent of the Commission for service, the said agent of the Commission shall be vested with all the powers of the sheriff to the extent of serving such order, execution or alias and levying or collecting thereunder. The agent of the Commission to whom such order or execution is referred shall give a bond not to exceed three thousand dollars ($3,000) approved by the Commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of execution. If any sheriff of this State or any agent of the Commission who is charged with the duty of serving executions shall willfully fail, refuse or neglect to execute any order directed to him by the said Commission and within the time provided by law, the official bond of such sheriff or of such agent of the Commission shall be liable for the overpayments and costs due by the claimant. Additionally, the Commission or its designated representatives in the collection of overpayments shall have the powers enumerated in G.S. 96-10(b)(2) and (3).

c. Any person who has been found by the Commission to have been overpaid under subparagraph (1) above shall be liable to have such sums deducted from future benefits payable to him under this Chapter.

d. Any person who has been found by the Commission to have been overpaid under subparagraph (2) above shall be liable to have such sums deducted from future benefits payable to him under this Chapter in such amounts as the Commission may by regulation prescribe but no such benefit payable for any week shall be reduced by more than fifty percent (50%) of that person's weekly benefit amount.

e. To the extent permissible under the laws and Constitution of the United States, the Commission is authorized to enter into or cooperate in arrangements or reciprocal agreements with appropriate and duly authorized agencies of other states or the United States Secretary of Labor, or both, whereby: (1) Overpayments of unemployment benefits as determined under subparagraphs (1) and (2) above shall be recovered by offset from unemployment benefits otherwise payable under the unemployment compensation law of another state, and overpayments of unemployment benefits as determined under the unemployment compensation law of such other state shall be recovered by offset from unemployment benefits otherwise payable under this Chapter; and, (2) Overpayments of unemployment benefits as determined under applicable federal law, with respect to benefits or allowances for unemployment provided under a federal program administered by this State under an agreement with the United States Secretary of Labor, shall be recovered by offset from unemployment benefits otherwise payable under this Chapter or any such federal program, or under the unemployment compensation law of another state or any such federal unemployment benefit or allowance program administered by such other state under an agreement with the United States Secretary of Labor if such other state has in effect a reciprocal agreement with the United States Secretary of Labor as authorized by Section 303(g)(2) of the federal Social Security Act, if the United States agrees, as provided in the reciprocal agreement with this State entered into under such Section 303(g)(2) of the Social Security Act, that overpayments of unemployment benefits as determined under subparagraphs (1) and (2) above, and overpayment as determined under the unemployment compensation law of another state which has in effect a reciprocal agreement with the United States Secretary of Labor as authorized by Section 303(g)(2) of the Social Security Act, shall be recovered by offset from benefits or allowances for unemployment otherwise payable under a federal program administered by this State or such other state under an agreement with the United States Secretary of Labor. (Ex. Sess. 1936, c. 1, s. 16; 1943, c. 319; c. 377, ss. 29, 30; 1945, c. 552, s. 34; 1949, c. 424, s. 26; 1951, c. 332, s. 16; 1953, c. 401, ss. 1, 22; 1955, c. 385, s. 9; 1959, c. 362, ss. 19, 20; 1965, c. 795, ss. 23, 24; 1971, c. 673, s. 31; 1977, c. 727, s. 55;

1979, c. 660, ss. 23-25; 1981, c. 160, s. 33; 1983, c. 625, s. 15; 1985, c. 552, s. 22; 1987, c. 103, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective April 27, 1987, added paragraph (g)(3)e.

Chapter 97.

Workers' Compensation Act.

Article 1.

Workers' Compensation Act.

Article 3.

Security Funds.

Article 4.

North Carolina Self-Insurance Guaranty Association.

Article 1.

Workers' Compensation Act.

§ 97-1. Short title.

Legal Periodicals. —

For survey of North Carolina construction law, with particular reference to workers' compensation, see 21 Wake Forest L. Rev. 633 (1986).

For note discussing workers' compensation and mental injuries, in light of 79 N.C. App. 483, 340 S.E.2d 116, disc. rev. denied, 317 N.C. 334, 346 S.E.2d 140 (1986), see 65 N.C.L. Rev. 816 (1987).

CASE NOTES

The Workers' Compensation Act is to be liberally construed, etc. —

In accord with 4th paragraph in main volume. See Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985); Apple v. Guilford County, — N.C. App. —, 353 S.E.2d 641 (1987).

In accord with 6th paragraph in main volume. See Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

Or to Expand Liability. —

In accord with main volume. See McDonald v. Brunswick Elec. Membership Corp., 77 N.C. App. 753, 336 S.E.2d 407 (1985).

Act Not Exclusive Remedy, etc. —

An employee was free to assert an intentional assault and battery tort action against a coemployee. The coemployee was liable when he intentionally tapped the employee behind the knees, causing her to fall and injure herself, although he allegedly did not intend or foresee the injury. Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985), aff'd, 318 N.C. 133, 347 S.E.2d 409 (1986).

Disability Compensation Agreement Constitutes Award. — A validly executed Industrial Commission Form 21 agreement ("Agreement for Compensation for Disability") constitutes an "award" under the North Carolina Workers' Compensation Act. Apple v. Guilford County, — N.C. App. —, 353 S.E.2d 641 (1987).

Effect of Superior Court's Jurisdictional Findings. — The Supreme Court would consider the superior court's findings of jurisdictional fact as binding on appeal if supported by the evidence when the question was whether the Industrial Commission or the superior court had jurisdiction over a claim. Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 350 S.E.2d 83, reh'g denied, 318 N.C. 704, 351 S.E.2d 736 (1986).

Cited in Lemmerman v. A.T. Williams Oil Co., — N.C. App. —, 339 S.E.2d 820 (1986); Cain v. Guyton, — N.C. App. —, 340 S.E.2d 501 (1986); Carawan v. Carolina Tel. & Tel. Co., — N.C. App. —, 340 S.E.2d 506 (1986); Gupton v. United States, 799 F.2d 941 (4th Cir. 1986).

§ 97-2. Definitions.

When used in this Article, unless the context otherwise requires —

(1) Employment. — The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which three or more employees are regularly employed in the same business or establishment or in which one or more employees are employed in activities which involve the use or presence of radiation, except agriculture and domestic services, unless 10 or more full-time nonseasonal agricultural workers are regularly employed by the employer and an individual sawmill

and logging operator with less than 10 employees, who saws and logs less than 60 days in any six consecutive months and whose principal business is unrelated to sawmilling or logging.

(18) Hernia. — In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

a. That there was an injury resulting in hernia or rupture.

b. That the hernia or rupture appeared suddenly.

c. Repealed by Session Laws 1987, c. 729, s. 2, effective August 5, 1987.

d. That the hernia or rupture immediately followed an accident. Provided, however, a hernia shall be compensable under this Article if it arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned.

e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provisions of G.S. 97-38. In nonfatal cases, if it is shown by special examination, as provided in G.S. 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this Artice.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this Article. (1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, c. 543; c. 672, s. 1; 1945, c. 766; 1947, c. 698; 1949, c. 399; 1953, c. 619; 1955, c. 644; c. 1026, s. 1; c. 1055; 1957, c. 95; 1959, c. 289; 1961, cc. 231, 235; 1967, c. 1229, s. 1; 1969, c. 206, s. 2; c. 707; 1971, c. 284, s. 1; c. 1231, s. 1; 1973, c. 521, ss. 1, 2; c. 763, ss. 1-3; c. 1291, s. 14; 1975, c. 266, s. 1; c. 284, ss. 2, 3; c. 288; c. 718, s. 3; c. 817, s. 1; 1977, c. 419; c. 893, s. 1; 1979, cc. 86, 374; c. 516, ss. 4, 5; c. 714, s. 3; 1981, c. 421, ss. 1, 2; 1983, c. 833; 1983 (Reg. Sess., 1984), c. 1042, s. 1; 1985, cc. 133, 144; 1987, c. 729, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of section was not affected by the amendment, it is not set out.

Effect of Amendments. —

Session Laws 1987, c. 729, s. 1, effective October 1, 1987, substituted "three or more employees" for "four or more employees" near the beginning of subdivision (1).

Session Laws 1987, c. 729, s. 2, effective August 5, 1987, deleted paragraph (18)c, reading "That it was accompanied

by pain," and added the second sentence of paragraph (18)d.

Legal Periodicals. —

For note, "Winstead v. Derreberry: Stepchildren and the Presumption of Dependence Under the North Carolina Workers' Compensation Act," see 64 N.C.L. Rev. 1548 (1986).

For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

CASE NOTES

I. IN GENERAL.

The social policy behind the Workers' Compensation Act is twofold. First, the Act provides employees swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment. Second, the Act insures limited liability for employers. Although the Act should be liberally construed to effectuate its intent, the courts cannot judicially expand the employer's liability beyond the statutory parameters. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Failure to Specify Defense. — Plaintiff was not prejudiced by failure of defendants to specify the defense which they planned to use at his hearing, and whatever defense the defendants may have relied upon, the burden was on plaintiff to prove that he was injured by an accident arising out of and in the course of employment. Parker v. Burlington Indus., Inc., 78 N.C. App. 517, 337 S.E.2d 589 (1985).

Effect of Superior Court's Jurisdictional Findings. — The Supreme Court would consider the superior court's findings of jurisdictional fact as binding on appeal if supported by the evidence when the question was whether the Industrial Commission or the superior court had jurisdiction over a claim. Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 350 S.E.2d 83, reh'g denied, 318 N.C. 704, 351 S.E.2d 736 (1986).

Quoted in Capps v. Standard Trucking Co., 77 N.C. App. 448, 335 S.E.2d 357 (1985); Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985).

II. EMPLOYMENT, EMPLOYEES, AND EMPLOYERS.

A. In General.

Stipulation as to Employment Relationship. — Stipulation of defendants, prior to hearing, that at the time of injury, the employment relationship existed between plaintiff and defendant employer, was binding on defendants; such a stipulation made it unnecessary for plaintiff to offer evidence of the validity or legal status of his corporate employer at the time of plaintiff's injury. Sorrell v. Sorrell's Farms & Ranches, Inc., 78 N.C. App. 415, 337 S.E.2d 595 (1985).

Joint employment, etc. —

In accord with 1st paragraph in the main volume. See Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

Even if there is a mutual business interest between the two employers, and perhaps even some element of control, joint employment as to one employer cannot be found in the absence of a contract with that employer. Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

Employment Shown. —

Eight year old child who did odd jobs as needed in defendant's service station/convenience store business, including stocking cigarettes and drinks and picking up trash, was defendant's employee at the time of accident. Lemmerman v. A.T. Williams Oil Co., 318 N.C. 557, 350 S.E.2d 83, reh'g denied, 318 N.C. 704, 351 S.E.2d 736 (1986).

Evidence that for a number of years, when he was able, and when his son, who ran a roofing business, needed him, decedent provided valuable roofing skills and services for his son, that in exchange for these services, which furthered his business, his son would provide decedent with three to four hundred dollars worth of necessities per month, and that without decedent's skills and services his son would not have been able to afford to provide the three to four hundred dollars worth of necessities per month, even though apart from their business relationship, he may have wanted to help out his father, showed that there existed an im-

plied oral contract of hire between employer-son and employee-father. Dockery v. McMillan, — N.C. App. —, 355 S.E.2d 153 (1987).

C. Regular Employment of Four (Now Three) or More.

Editor's Note. — The annotations under this analysis line below and in the main volume were decided under this section prior to its amendment by Session Laws 1987, c. 729, s. 1, which decreased the regular employment requirement in subdivision (1) from four to three employees.

Having five (now three) or more employees is a jurisdictional prerequisite, etc. —

In accord with main volume. See Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

The plaintiff has the burden of proving that the employer regularly employed five (now three) or more employees. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

Evidence Held Sufficient. —

Plaintiff's testimony, which was corroborated by defendant's records, held competent evidence that defendant regularly employed five (now three) or more employees during the period of plaintiff's employment with defendant and that the Commission thus had jurisdiction. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

D. Casual Employment.

Eight-year-old child of part-time cashier who sustained an accidental injury on the premises of defendant's convenience store and service station, at which he stayed after school, and at which on some afternoons he did tasks about the place, such as carrying out the garbage, picking up trash and restocking the cigarette, candy and soft drink machines, for which he was paid a dollar or so, was at least a casual employee, whose employment was not excluded by the statute, since the work that he did was required in the operation of defendant's business. Fact that the child was too young to be lawfully employed was irrelevant. Lemmerman v. A.T. Williams Oil Co., 79 N.C. App. 642, 339 S.E.2d 820, aff'd, 318 N.C. 577, 350 S.E.2d 83 (1986).

Employment Held Not Casual. —

Plaintiff who had been employed full-time for three months prior to accident, and who also worked on Saturdays by choice and with the agreement of his employer, was not merely a casual employee. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

E. Independent Contractors.

1. In General.

Act Inapplicable to Independent Contractor. —

To establish that he was covered by the provisions of this Article, a worker had the burden of proving that he was either an employee of a subcontractor or the general contractor, rather than an independent subcontractor. Gordon v. West Constr. Co., 75 N.C. App. 608, 331 S.E.2d 259 (1985).

G. Employees Lent By Employer.

Test of Employment. —

In accord with 2nd paragraph in the main volume. See Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

Presumption Regarding Continuance of General Employment. — In lent employee cases, the only presumption is the continuance of the general employment, which is taken for granted as the beginning point of any lent-employee problem. To overcome this presumption, it is not unreasonable to insist upon a clear demonstration that a new temporary employer has been substituted for the old. Failing this, the general employer should remain liable. Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

I. Agriculture.

The commercial processing of agricultural commodities for seed is not an agricultural activity. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

Plaintiff, who was employed to process oats, soybeans and barley through the gin process, and to do other work incidental to the ginning operation, was not a farm laborer under § 97-13(b), and the fact that plaintiff was operating a tractor in a field in which crops were eventually to be planted when he was injured, during a one-time excursion out of the ginning process and into an activity more akin to farming or agricultural

labor, did not interrupt his compensation coverage. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

III. AVERAGE WEEKLY WAGES.

A. In General.

Compensation of Volunteer Fireman. — Subdivision (5) of this section employs the term "principally" to distinguish a fireman's volunteer employment from his other, remunerative employment or employments, i.e., "the employment wherein he principally earned his livelihood." The statute insures that the injured volunteer fireman receives compensation commensurate with his proven earning ability, as demonstrated by the wages he receives for work done other than in his capacity as a volunteer fireman. Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

The dictum in Barnhardt v. Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966), which suggests that subdivision (5) of this section does not permit a combination of a volunteer fireman's outside wages, is overruled. Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

Where volunteer fireman, at the time he was injured, was earning $74.41 working part-time for one employer and $87.40 per week working part-time for another employer, the Commission should have considered his wages in both part-time employments to compute his average weekly wage. Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

IV. COMPENSABLE INJURIES, GENERALLY.

Finding of Injury Required. — The fact that plaintiff sustained an injury is a critical fact upon which her right to compensation depends; thus, a specific finding of that fact is required by the Commission. Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Finding that plaintiff experienced pain as a result of what occurred while performing her duties was not a sufficient finding that plaintiff sustained an injury. Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Back Injuries. — By amending the second sentence of subdivision (6) to say that an accident with respect to back injuries includes an injury that is the "result of a specific traumatic incident," the General Assembly intended to relax the requirement that there be some unusual circumstance that accompanied the injury; the use of the words "specific" and "incident" means that the trauma or injury must not have developed gradually but must have occurred at a cognizable time. Bradley v. E.B. Sportswear, Inc., 77 N.C. App. 450, 335 S.E.2d 52 (1985).

V. ACCIDENT.

Editor's Note. — Earlier cases dealing with back injuries should be read in light of the 1983 amendment to subdivision (6) of this section, which modified the definition of "injury" with respect to back injuries so as to cover "specific traumatic incidents." Caskie v. R.M. Butler & Co., — N.C. App. —, 354 S.E.2d 242 (1987).

The terms "injury" and "accident," as used in the act, etc. —

In accord with main volume. See Swindell v. Davis Boat Works, Inc., 78 N.C. App. 393, 337 S.E.2d 592 (1985), cert. denied and appeal dismissed, 316 N.C. 385, 342 S.E.2d 908 (1986).

The accident must be a separate event, etc. —

In accord with 2nd paragraph in main volume. See Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Or Involves a Result Produced by, etc. —

In accord with 1st paragraph in main volume. See Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

An injury must involve more, etc.—

Where an injury occurs while the plaintiff is carrying on his usual and customary duties in his usual way, the injury does not arise by accident. This is true even where the exertion is the obvious cause of the injury. Dillingham v. Yeargin Constr. Co., 82 N.C. App. 684, 348 S.E.2d 143 (1986), cert. granted, 318 N.C. 693, 351 S.E.2d 743 (1987).

Accident involves the interruption of the work routine and, etc. —

In accord with main volume. See Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985).

An injury which occurs under normal work conditions, etc. —

Once an activity, even a strenuous or

otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an "injury by accident" under the Workers' Compensation Act. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by an accident. Swindell v. Davis Boat Works, Inc., 78 N.C. App. 393, 337 S.E.2d 592 (1985), cert. denied and appeal dismissed, 316 N.C. 385, 342 S.E.2d 908 (1986).

The Industrial Commission's conclusion of law that plaintiff did not sustain a compensable injury was adequately supported by its finding that plaintiff's back pain was not the result of any interruption of her normal work routine, in that plaintiff was doing her usual job in her usual and customary manner, and was not the result of any specific traumatic incident, in that plaintiff had experienced back pain over an extended period of time. Causby v. Bernhardt Furn. Co., 83 N.C. App. 650, 351 S.E.2d 106 (1986).

There must be some new circumstance not a part of usual work routine in order to find that an accident has occurred. Swindell v. Davis Boat Works, Inc., 78 N.C. App. 393, 337 S.E.2d 592 (1985), cert. denied and appeal dismissed, 316 N.C. 385, 342 S.E.2d 908 (1986).

Heart Attack. —

Where an injury is caused by a heart attack, the plaintiff must show that it was precipitated by some unusual or extraordinary exertion. Dillingham v. Yeargin Constr. Co., 82 N.C. App. 684, 348 S.E.2d 143 (1986), cert. granted, 318 N.C. 693, 351 S.E.2d 743 (1987).

"Specific traumatic incident" amendment to subdivision (6) was intended to supplement the law related to back injuries, not to supplant it. The effect of the amendment was to eliminate the need to show an external cause or unusual conditions in order for a worker to receive compensation for a back injury. Instead, what may be shown is that the back injury arose in the course of the employment and that the injury was "the direct result of a specific traumatic incident of the work assigned." Caskie v. R.M. Butler & Co., — N.C. App. —, 354 S.E.2d 242 (1987).

Evidence Supported Finding of Back Injury. — Based on evidence that repeated lifting of cases of cigarettes, coupled with twisting and contorting in a cramped area to reach in behind and on top of cigarette display rack, was not part of plaintiff's job routine, and the commission's finding that plaintiff had never performed as much repetitious lifting and stacking of cases on a single day as she did on the date of her back injury, under existing case law, without deciding the issue of specific traumatic incident, the commission should have concluded that plaintiff's back injury was an injury by accident arising out of and in the course of employment, thereby qualifying as a compensable injury under the first sentence of subdivision (6). Caskie v. R.M. Butler & Co., — N.C. App. —, 354 S.E.2d 242 (1987).

Where employee was not engaged in his routine duties in his customary fashion at the time he sustained an injury to his back, the injury was accidental and compensable. Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985) (decision prior to the 1983 amendment to subdivision (6)).

Insufficient to Show that Activity Caused No Pain in Past. — It is insufficient as a matter of law to show only that in the past a regular activity caused no pain and that the same activity now causes pain; there must be a specific fortuitous event, rather than a gradual build-up of pain, in order to show injury by accident. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Employer's Knowledge of Earlier Injury Did Not Make Injury Compensable. — Finding of the Commission that plaintiff's back injury was not accidental, in that the evidence failed to disclose an interruption of plaintiff's normal work routine, which involved the regular and repetitive lifting, albeit without usage of his left hand, was supported by the evidence, despite plaintiff's argument that because his employer knew of disability certificate given him by his physician following an earlier hand injury but nonetheless assigned him duties which involved lifting heavy objects, the injury occurred as a matter of law outside his normal work routine. Pittman v. Inco, Inc., 78 N.C. App. 134, 336 S.E.2d 637 (1985), cert.

denied, 315 N.C. 589, 341 S.E.2d 28 (1986).

VI. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

A. In General.

As the phrases "arising out of" and "in the course of" are not synonymous, etc. —

In accord with 3rd paragraph in the main volume. See Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

The term "arising out of" refers to the origin of the injury or the causal connection of the injury to the employment, while the term "in the course of" refers to the time, place and circumstances under which the injury occurred. Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 343 S.E.2d 551, cert. denied, 318 N.C. 417, 349 S.E.2d 600 (1986).

Mixed Question, etc. —

In accord with the main volume. See Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 343 S.E.2d 551, cert. denied, 318 N.C. 417, 349 S.E.2d 600 (1986).

Injury While Performing Task Which Was Not Part of Job. — Where it was not a part of the plaintiff's job to clean tote tank, the tote tank was not supposed to be cleaned and the cleaning of it did not further the business of the employer, the Industrial Commission was correct in concluding that plaintiff was "not about his work" when he was overcome by fumes while cleaning the tote tank. Parker v. Burlington Indus., Inc., 78 N.C. App. 517, 337 S.E.2d 589 (1985).

If employee does something which he is not specifically ordered not to do by a then present superior and the thing he does furthers the business of the employer although it is not a part of the employee's job, an injury sustained by accident while he is so performing is in the course of employment. This has been characterized as "being about his work." Parker v. Burlington Indus., Inc., 78 N.C. App. 517, 337 S.E.2d 589 (1985).

B. Arising Out of.

There Must Be a Causal Connection, etc.—

In accord with 5th paragraph in the main volume. See Fortner v. J.K. Holding Co., 83 N.C. App. 101, 349 S.E.2d 296 (1986).

Employment Must Be a Contributing Proximate Cause, etc. —

The test of whether an accidental injury "arises out of" the employment is whether a contributing proximate cause of the injury was a risk inherent or incidental to the employment and one to which the employee would not have been equally exposed apart from the employment. Fortner v. J.K. Holding Co., 83 N.C. App. 101, 349 S.E.2d 296 (1986).

C. In the Course of.

What Activity Is Covered. —

An injury occurs "in the course of" the employment when the injury occurs during the period of employment at a place where an employee's duties are calculated to take him, and under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business. Fortner v. J.K. Holding Co., 83 N.C. App. 101, 349 S.E.2d 296 (1986).

VII. INJURIES WHILE ACTING FOR BENEFIT OF SELF OR THIRD PERSON.

Plaintiff, who was injured when she fell off a chair in her home while hanging plants on her porch, which plants she had been instructed by her employer to dispose of incident to the closing of employer's place of business, was not entitled to compensation. Fortner v. J.K. Holding Co., 83 N.C. App. 101, 349 S.E.2d 296 (1986).

Special Errand and Dual Purpose Rule. — Plaintiff employee, who was injured while on her way to a company gathering with her supervisor, the company president, when she was asked to run several errands for her supervisor, i.e. to go by the post office, to go by the mall to pick up pictures of her supervisor's vacation, and to turn the car around and go look at a "trailer for rent," the reasons for which gathering were to alleviate office tensions, celebrate several birthdays and cement relationships, was entitled to compensation under the special errand rule and the dual purpose rule. McBride v. Peony Corp., — N.C. App. —, 352 S.E.2d 326 (1987).

VIII. INJURIES WHILE GOING TO AND FROM WORK.

A. In General.

Injury Suffered Going to or Returning from Work, etc. —

In accord with 1st paragraph in the main volume. See Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 343 S.E.2d 551, cert. denied, 318 N.C. 417, 349 S.E.2d 600 (1986).

Special Errand Exception, etc. —

The "special errand" exception provides that an injury is in the course of the employment if it occurs while the employee is engaged in a special duty or special errand for his employer. Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 343 S.E.2d 551, cert. denied, 318 N.C. 417, 349 S.E.2d 600 (1986).

Employee Held Not on Special Errand. — Evidence that church custodian, who was killed in an automobile accident late in the evening on the way from his parents' house to visit his fiancee, was planning to spend the night at the church following this visit so that despite an anticipated snowstorm he would be able to let a certain nonsupervisory volunteer into the church at 8:00 a.m. the next morning, when his work day ordinarily began, was not sufficient to establish that the custodian was on a special errand for his employer when he met his death. Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 343 S.E.2d 551, cert. denied, 318 N.C. 417, 349 S.E.2d 600 (1986).

XI. HORSEPLAY.

Back Injury Caused By Fellow Employee. — Plaintiff employee, who was injured when he told co-worker who was sitting on a box of cloth in employer's dyeing department that he was going to turn him over onto the floor, upon which co-employee got up and grabbed the front of plaintiff's belt and jerked him, causing an injury to plaintiff's back which eventually resulted in plaintiff having a disc removed from his back by surgery, sustained his injury by accident arising out of and in the course of his employment as a result of horseplay, and was entitled to compensation. McGraw v. Fieldcrest Mills, Inc., — N.C. App. —, 352 S.E.2d 435 (1987).

XIII. AGGRAVATION OF EXISTING CONDITION OR INFIRMITY.

Employment Need Not Be Sole, etc.—

In accord with 1st paragraph in main volume. See Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Back Injury following Previous Back Surgery. — Under the evidence the Commission could determine that plaintiff's work-related back injury and the surgery which followed contributed to his disability in a reasonable degree, regardless of the fact that he had two previous laminectomies, and that, as a result, plaintiff was entitled to compensation. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Compensation for Entire Resulting Disability. — When a pre-existing, nondisabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability, even though it would not have disabled a normal person to that extent. In such a case, where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the pre-existing condition will not be weighed. Wilder v. Barbour Boat Works, — N.C. App. —, 352 S.E.2d 690 (1987).

XV. HERNIA.

Failure to Prove Any Element, etc.—

To recover compensation for a hernia, a plaintiff must prove the existence of each of the five elements of subdivision (18). The absence of any one of them will result in the denial of compensation. Long v. Morganton Dyeing & Finishing Co., 84 N.C. App. 81, 351 S.E.2d 767 (1987).

This section, in effect, defines what constitutes a causal connection for purposes of hernia injury, and when any one of the section's elements is not proven, a causal connection does not exist. This is true even if the Commission is otherwise convinced that the hernia was caused by

an accident arising out of and in the course of employment. Long v. Morganton Dyeing & Finishing Co., 84 N.C. App. 81, 351 S.E.2d 767 (1987).

Failure to Prove Hernia Accompanied By Pain. — Where plaintiff never testified that he suffered any pain, although he testified to a general feeling of nausea and muscle strain, the Commission's finding that he failed to prove that his hernia was accompanied by pain was supported by competent evidence. Long v. Morganton Dyeing & Finishing Co., 84 N.C. App. 81, 351 S.E.2d 767 (1987).

XVI. ILLUSTRATIVE CASES.

D. Miscellaneous Cases.

Editor's Note. *— Earlier cases dealing with back injuries should be read in light of the 1983 amendment to subdivision (6) of this section, which modified the definition of "injury" with respect to back injuries so as to cover "specific traumatic incidents." Caskie v. R.M. Butler & Co., — N.C. App. —, 354 S.E.2d 242 (1987).*

Loss of Sight Subsequent to Splashing of Fuel in Eye. — Employee who suffered a loss of sight in his left eye incident to a hemorrhagic central retinal vein occlusion subsequent to an accidental splashing of fuel in the eye could be awarded compensation if the Commission found that the burning and itching occasioned by the fuel-splashing caused employee, through a natural reflex, to vigorously rub his eyes and that the rubbing caused, aggravated, accelerated, or precipitated the hemorrhagic vein occlusion, even if the employee were to have a predisposition toward developing this condition. To deny compensation, the Commission would have to find and conclude that the vigorous rubbing did not significantly cause, aggravate, accelerate, or precipitate the occlusion. Jackson v. L.G. DeWitt Trucking Co., 82 N.C. App. 208, 346 S.E.2d 160 (1986).

Heart Attack Suffered by Nuclear Power Plant Worker. — Where working in an area of nuclear power plant in a radiation suit under hot and cramped conditions was part of employee's usual duties, and the manner and method by which he performed his duties on the day in question were not unusual or extraordinary, commission's conclusion that the heart attack suffered by the employee was not an injury by accident arising out of and in the course of his employment would be affirmed. Dillingham v. Yeargin Constr. Co., 82 N.C. App. 684, 348 S.E.2d 143 (1986), cert. granted, 318 N.C. 693, 351 S.E.2d 743 (1987).

Seed Processor Bush Hogging for Employer on Saturday. — Plaintiff, who worked on Saturdays by choice and with the agreement of his employer, and whose primary duties involved processing soybeans, oats and barley through the gin, but who, on the Saturday of his accident, when the gin was not in operation, was instructed by his employer to "bush hog" in the area around the gin and in a field leased by his employer, which job was related to his employer's business, sustained an injury by accident which arose out of and in the course of his employment. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

Injury Incident to New Job. — Employee who ruptured a tendon as he was twisting and jerking hose off a mandrel incident to a new job in the curved hose department of employer, to which he had been assigned when, to avoid being laid off, he exercised his contractual right to displace another employee in a different department with less union seniority, and who had spent two days observing the new job and two days and a few hours doing the new job, was entitled to compensation for an injury arising by accident. Gunter v. Dayco Corp., 317 N.C. 670, 346 S.E.2d 395 (1986).

Unexplained Death. — Widow of 57-year-old truck driver who was found dead in a large parking lot at his place of employment was not entitled to compensation where, although the evidence was sufficient to raise an inference that decedent had accidentally fallen while inspecting the van for damage, plaintiff failed to prove that decedent died as a proximate result of injuries sustained in that fall, and in fact offered no medical evidence of injury or the cause of decedent's death. Pickrell v. Motor Convoy, Inc., 82 N.C. App. 238, 346 S.E.2d 164, cert. granted, — N.C. —, 349 S.E.2d 864 (1986).

Claimant, mother of a 34-year-old cablevision lineman who was found dead at the base of a utility pole by two coworkers, was not entitled to benefits, where the examining pathologist attributed the probable cause of her son's death to marked atherosclerotic coro-

nary artery disease, although he noted that the possibility of a low voltage injury could not be completely excluded, and she was not entitled to a presumption that, upon an unexplained death, there was an inference the death arose out of the employment and was compensable, nor to a presumption that close cases should be decided to the employee's benefit. Gilbert v. B & S Contractors, 81 N.C. App. 110, 343 S.E.2d 609 (1986).

XV. HERNIA.

Editor's Note. — The cases under this analysis line in the main volume were decided prior to the amendment of subdivision (18) of this section by Session Laws 1987, c. 729, s. 2, which deleted former paragraph (18)c, requiring that a hernia be accompanied by pain, and added the proviso in paragraph (18)d.

XVII. DISABILITY.

To obtain an award, etc. —

To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Under the act, disability refers not to physical infirmity, etc. —

In accord with 1st paragraph in main volume. See Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985); Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

"Disability" under this Chapter means an impairment in the employee's wage-earning capacity because of injury, not merely a physical impairment. Hendrix v. Linn-Corriher Corp., 78 N.C. App. 373, 337 S.E.2d 106 (1985).

Fact that claimant may be capable of doing sedentary work does not establish that she is not disabled. Disability under the Workers' Compensation Act is not to be equated with physical infirmity. Other factors tending to show the unemployability of the worker, such as age, education and experience, may be considered. McCubbins v. Fieldcrest Mills, Inc., 79 N.C. App. 409, 339 S.E.2d 497, cert. denied, 316 N.C. 732, 345 S.E.2d 389 (1986).

The test for disability is whether, etc. —

In accord with 1st paragraph in the main volume. See Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Disability is measured by the capacity, etc. —

In order for the Commission to award disability compensation, the plaintiff must prove and the Commission must find: (1) That he was incapable of earning the same wages he had earned before his injury in the same employment, (2) that he was incapable of earning the same wages he had earned before his injury in any other employment, and (3) that his incapacity was caused by his injury or occupational disease. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986); Taylor v. Margaret R. Pardee Mem. Hosp., 83 N.C. App. 385, 350 S.E.2d 148 (1986).

And Not by Employer's Willingness, etc.—

The Workers' Compensation Act does not permit an employer to avoid its duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which the employer could terminate at will or for reasons beyond its control. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

When a person has been offered, but has not accepted, employment after an accident, and the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Supply room position offered to employee by employer, which was so modified because of employee's medical condition that the position would not be offered in the competitive job market, could not be considered as evidence of employee's ability to earn wages. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

But there is no "disability," etc. —

Statement in Branham v. Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943) [annotated in the main volume] that there is no disability if the employee is receiving the same wages in the same or other employment is correct only so long as

the employment reflects the employee's ability to earn wages in the competitive market. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Capacity of Particular Employee, etc. —

Where an employee's efforts to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

The Commission must decide the disability issue based on the particular characteristics of the individual employee. This necessitates a consideration of the employee's age, work experience, training, education and any other factors which might affect his ability to earn wages. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Individual, intellectual and vocational considerations may be taken into account on the issue of disability. Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

Employee Able to Do Other Work Not Entitled to Compensation. — Where the uncontradicted medical testimony indicated that plaintiff, a 46 year old man with an eighth grade education who was unable to read a newspaper or spell, suffered from a mild case of employment-related chronic obstructive lung disease, with a 20 to 30 percent lung impairment, but that plaintiff was capable of work involving a clean environment, moderate activity and anything requiring manual dexterity, plaintiff was not entitled to compensation under this Chapter. Hendrix v. Linn-Corriher Corp., 78 N.C. App. 373, 337 S.E.2d 106 (1985), aff'd in part and rev'd in part, 317 N.C. 179, 345 S.E.2d 374 (1986).

When Search for Work Need Not Be Shown. — While in order to prove disability, an injured employee must prove that he is unable to work and not merely that he unsuccessfully sought work, the converse is not true. In order to prove disability, the employee need not prove that he unsuccessfully sought employment if the employee proves that he is unable to obtain employment. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Claimant Unable to Earn Wages in Any Job for Which Qualified Is Totally, Not Partially, Disabled. — The Commission erred as a matter of law by awarding claimant compensation for partial disability when it found as fact that plaintiff was incapable of earning wages in any employment for which plaintiff was qualified. Based on the Commission's findings, plaintiff was totally disabled within the meaning of § 97-29. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Where a plaintiff, due to an occupational disease, is fully incapacitated to earn wages at employment which is the only work he is qualified to do by reason of such factors as age and education, he is totally incapacitated. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Uncontroverted evidence established that plaintiff, whom the court found to be 59 years old and to have a third-grade education, was totally disabled, where although the impairment rating of his left leg was only 45%, the evidence showed plaintiff to be totally and permanently unable tro earn the wages he was receiving at the time of his injury. Wilder v. Barbour Boat Works, — N.C. App. —, 352 S.E.2d 690 (1987).

The determination of whether a disability exists, etc. —

In accord with main volume. See Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Findings Required to Support Conclusion of Disability. —

In accord with main volume. See Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985); Hendrix v. Linn-Corriher Corp., 78 N.C. App. 373, 337 S.E.2d 106 (1985), aff'd in part and rev'd in part, 317 N.C. 179, 345 S.E.2d 374 (1986).

Inability to Earn Wages Earned Before Injury Must Be Shown. — Before the plaintiff may receive compensation, he must show that he is not capable of earning the same wages he had earned before his injury. Merely showing that plaintiff is not earning the same wages after his injury than before is insufficient. Hendrix v. Linn-Corriher Corp., 78 N.C. App. 373, 337 S.E.2d 106 (1985), aff'd in part and rev'd in part, 317 N.C. 179, 345 S.E.2d 374 (1986).

Wages received by claimant after his injury are strong but not conclusive evidence of his ability to earn for purposes of determining whether he is disabled within the meaning of subdivi-

sion (9) of this section. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Receipt of Higher Wages for Unsatisfactory Work. — It was not error for the Commission to conclude that employee was permanently partially disabled even though the evidence showed that he had worked in the packing room at a wage higher than he had ever before earned after his impairing lung disease was diagnosed, where the Commission found without exception that he performed unsatisfactorily at this job in the packing department, and where the evidence demonstrated that although he was capable of performing less skilled jobs at the mill, which he did for more than 30 years, he had difficulty in a position requiring greater skills. Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

Effect of Retirement. — Because disability measures an employee's present ability to earn wages, and is unrelated to a decision to withdraw from the labor force by retirement, the Commission may not deny disability benefits because the claimant retired, where there is evidence of diminished earning capacity caused by an occupational disease. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Evidence of Partial Disability Held Sufficient. — Evidence held sufficient to support the finding that plaintiff was partially incapable of engaging in gainful employment by byssinosis and chronic obstructive lung disease as a result of 29 years of smoking and exposure to cotton dust and that his occupational disease, combined with his age, limited education and work experience, limited his ability to earn wages. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

XVIII. BURDEN OF PROOF AND EVIDENCE.

Burden of Proving Disability. — In accord with 1st paragraph in the main volume. See Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986); Taylor v. Margaret R. Pardee Mem. Hosp., 83 N.C. App. 385, 350 S.E.2d 148 (1986).

Whether an employee is disabled is a question of law which must be based on findings of fact supported by competent evidence. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

XIX. COMPENSATION.

Compensation must be based upon the loss of wage earning power rather than the amount actually received. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Partially Disabled Employee Held Entitled to Difference between Wage Paid by Employer and Wage Received Thereafter. — Where the evidence tended to show that plaintiff was permanently partially disabled by reason of occupational disease and that after failing to obtain employment in the cotton textile industry in which he had been employed for 29 years, the plaintiff made an earnest and highly commendable search for other employment, and was able to obtain a permanent job with a restaurant at the minimum wage but was released from that employment only because business conditions resulted in the restaurant going out of business, the Commission was required to enter an award setting the plaintiff's compensation at two-thirds of the difference between his average wage of $196.91 a week while working for the defendant and the minimum wage of $134.00 a week which he received thereafter, an award of $41.94 per week, not to exceed 300 weeks. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

§ 97-6.1. Protection of claimants from discharge or demotion by employers.

CASE NOTES

The General Assembly intended subsection (e) of this section to be a narrow exception to the general rule in subsection (a) that an employer may not dismiss an employee who has in good faith instituted a proceeding against the employer. Johnson v. Builder's Transp., Inc., 79 N.C. App. 721, 340 S.E.2d 515 (1986).

Employee May Be Discharged for Bona Fide Reasons. — When subsections (a) and (e) of this section are read

in pari materia, it becomes clear that pursuant to subsection (e) an employer may discharge an employee for a bona fide reason such as the fact that the employee is so disabled that he or she is no longer able to effectively carry out the duties for which he or she is employed. Johnson v. Builder's Transp., Inc., 79 N.C. App. 721, 340 S.E.2d 515 (1986).

Judgment for Employer Upheld. — In a civil action for retaliatory discharge instituted by plaintiff employee against defendant employer alleging a violation of this section, the fact that plaintiff had received compensation for permanent partial disability, along with uncontradicted affidavits submitted by defendant showing that this disability interfered with his ability to adequately perform available work, rendered inquiry into the reasoning for his dismissal pointless, and supported trial court's award of summary judgment to employer. Johnson v. Builder's Transp., Inc., 79 N.C. App. 721, 340 S.E.2d 515 (1986).

Cited in Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).

§ 97-9. Employer to secure payment of compensation.

Legal Periodicals. —

For note, "Pleasant v. Johnson: The North Carolina Supreme Court Enters the Twilight Zone — Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?", see 64 N.C.L. Rev. 688 (1986).

CASE NOTES

Editor's Note. — *For additional cases relating to rights and remedies against employer, see the case notes under § 97-10.1.*

Act Provides Sole Remedy, etc. — The North Carolina Workers' Compensation Act provides the exclusive remedy when an employee is injured in the course of his or her employment by the willful, wanton and reckless negligence of the employer, and an employee may not bring a civil action against the employer for injuries received as a result of such negligence. Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986).

A claim for punitive damages is also subject to the bar of the exclusivity provision of the act. Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986).

Conduct Violating Safety Codes and Laws. — The exclusiveness of the act cannot be avoided by bringing a civil action against the employer merely because the conduct complained of is alleged to violate the National Electric Code and Occupational Safety and Health Act of North Carolina (OSHANC). Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986).

Cited in Mueller v. Daum & Dewey, Inc., 636 F. Supp. 192 (E.D.N.C. 1986).

§ 97-10.1. Other rights and remedies against employer excluded.

Legal Periodicals. —

For note, "Pleasant v. Johnson: The North Carolina Supreme Court Enters the Twilight Zone — Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?", see 64 N.C.L. Rev. 688 (1986).

CASE NOTES

Editor's Note. — *For additional cases relating to rights and remedies against employer and coemployee, see the case notes under § 97-9.*

Employee's Rights and Remedies Hereunder Are Exclusive. —

The North Carolina Workers' Compensation Act provides the exclusive

remedy when an employee is injured in the course of his or her employment by the willful, wanton and reckless negligence of the employer, and an employee may not bring a civil action against the employer for injuries received as a result of such negligence. Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986).

A claim for punitive damages is also subject to the bar of the exclusivity provision of the act. Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986).

Conduct Violating Safety Codes and Laws. — The exclusiveness of the act cannot be avoided by bringing a civil action against the employer merely because the conduct complained of is alleged to violate the National Electric Code and Occupational Safety and Health Act of North Carolina (OSHANC). Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986).

Action Against Employer for Intentional Conduct Is Not Barred. — The Workers' Compensation Act does not bar a common law action by an employee against his employer for the intentional conduct of the employer. Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).

Actions for intentional infliction of mental and emotional distress are not barred by this section. Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).

Sexual Harassment by Coemployee. — Although the North Carolina Workers' Compensation Act eliminated negligence as a basis of recovery against an employer, the act covers only those injuries which arise out of and in the course of employment. Emotional injury allegedly suffered by plaintiff, resulting from coemployee's sexual harassment, was not a natural and probable consequence or incident of the employment so as to bar her claim for negligence against employer in retaining the coemployee in a supervisory position after having actual notice of his proclivity to engage in sexually offensive conduct. Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).

Stated in Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

Cited in Mueller v. Daum & Dewey, Inc., 636 F. Supp. 192 (E.D.N.C. 1986); Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 350 S.E.2d 83 (1986).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

Legal Periodicals. —

For note, "Pleasant v. Johnson: The North Carolina Supreme Court Enters the Twilight Zone — Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?", see 64 N.C.L. Rev. 688 (1986).

CASE NOTES

I. IN GENERAL.

Trial court did not err in limiting interest allowed plaintiff to the interest on the amount of the jury award as reduced pursuant to this section. Absher v. Vannoy-Lankford Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985), cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Appeal from Reduced Award. — Plaintiff was not a "party aggrieved" by judgment entered in superior court reducing her ultimate recovery to the difference between jury award and workers' compensation award pursuant to this section, so as to permit her appeal from such recovery. Absher v. Vannoy-Lankford Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985), cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Stated in Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

CASE NOTES

I. IN GENERAL.

The employer has the burden, etc. —

The employer has the burden of proving intoxication as an affirmative defense. He must prove not only that the employee was intoxicated at the time of the accident causing the injury or death, but also that the accident was proximately caused by the employee's intoxication. Torain v. Fordham Drug Co., 79 N.C. App. 572, 340 S.E.2d 111 (1986).

The employer need not disprove all other possible causes of the accident and injury, nor need he prove that intoxication was the sole proximate cause of the accident; he is only required to prove that the employee's intoxication was more probably than not a proximate cause of the accident and resulting injury. Torain v. Fordham Drug Co., 79 N.C. App. 572, 340 S.E.2d 111 (1986).

Intoxication, willful intention and being under the influence of a controlled substance are affirmative defenses which place the burden of proof on the employer in a claim for workers' compensation. Harvey v. Raleigh Police Dep't, — N.C. App. —, 355 S.E.2d 147 (1987).

Evidence of Intoxication. — The Industrial Commission had the power to determine whether physician was qualified to testify as an expert in stating his opinion as to deceased employee's intoxication at 2:50 p.m., based on a blood alcohol test administered at 5:00 p.m. Torain v. Fordham Drug Co., 79 N.C. App. 572, 340 S.E.2d 111 (1986).

Suicide Induced by Injury. —

An employee who becomes mentally deranged and deprived of normal judgment as a result of a compensable accident and commits suicide in consequence does not act willfully within the meaning of this section. Elmore v. Broughton Hosp., 76 N.C. App. 582, 334 S.E.2d 231, cert. denied, 315 N.C. 390, 338 S.E.2d 879 (1985).

An employee's suicide caused by an occupational disease is compensable under the Workers' Compensation Act. This is so because § 97-52 makes it clear that the death of an employee resulting from an occupational disease shall be treated as the happening of an injury by accident. Harvey v. Raleigh Police Dep't, — N.C. App. —, 355 S.E.2d 147 (1987).

Cited in Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986).

II. ILLUSTRATIVE CASES.

"Psychological Autopsy" Properly Admitted. — "Psychological autopsy" on decedent, involving interviewing family members and reviewing records to determine the probable cause of death or the decedent's state of mind at the time of his death, was competent and properly admitted for the purpose of determining the mental state of the deceased at the time of his suicide in a workers' compensation proceeding wherein plaintiff alleged that decedent's suicide was caused by a dysthymic disorder (depression) caused by his employment as a police officer. Harvey v. Raleigh Police Dep't, — N.C. App. —, 355 S.E.2d 147 (1987).

Injury Held Result of Intoxication. — When considered together, the evidence with respect to the manner in which deceased employee was driving, the presence of an odor of alcohol about his person, his statement that he had been drinking, and the level of alcohol found in his blood supported the Commission's finding of fact that he was intoxicated at the time of the accident, and that his intoxication was a proximate cause of the accident and his resulting injuries and death, as did evidence negating brake failure as a cause of the accident. Torain v. Fordham Drug Co., 79 N.C. App. 572, 340 S.E.2d 111 (1986).

§ 97-13. Exceptions from provisions of Article.

(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government, Employer of Less than Three Employees. — This Article shall not apply to casual employees, farm laborers when fewer than 10 full-time nonseasonal farm laborers are regularly employed by the same employer, federal government employees in North Carolina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than three employees in the same business within this State, except that any employer without regard to number of employees, including an employer of domestic servants, farm laborers, or one who previously had exempted himself, who has purchased workers' compensation insurance to cover his compensation liability shall be conclusively presumed during life of the policy to have accepted the provisions of this Article from the effective date of said policy and his employees shall be so bound unless waived as provided in this Article; provided however, that this Article shall apply to all employers of one or more employees who are employed in activities which involve the use or presence of radiation.

(1929, c. 120, s. 14; 1933, c. 401; 1935, c. 150; 1941, c. 295; 1943, c. 543; 1945, c. 766; 1957, c. 349, s. 10; c. 809; 1967, c. 996, s. 13; 1971, c. 284, s. 2; c. 1176; 1975, c. 718, s. 3; 1979, c. 247, s. 1; c. 714, s. 2; 1981, c. 378, s. 1; 1983 (Reg. Sess., 1984), c. 1042, s. 2; 1987, c. 729, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1987 amendment, effective October 1, 1987, substituted "Three employees" for "Four employees" in the subsection catchline to subsection (b), and substituted "three employees" for "four employees" near the middle of subsection (b).

Legal Periodicals. — For 1984 survey, "Employee Exclusion Clauses in Automobile Liability Insurance Policies," see 63 N.C.L. Rev. 1228 (1985).

CASE NOTES

II. CASUAL EMPLOYEES.

Plaintiff who had been employed full-time for three months prior to accident, and who also worked on Saturdays by choice and with the agreement of his employer, was not merely a casual employee. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

III. FARM LABORERS.

Plaintiff, who was employed to process oats, soybeans and barley through the gin process, and to do other work incidental to the ginning operation, was not a farm laborer under subsection (b) of this section, and the fact that plaintiff was operating a tractor in a field in which crops were eventually to be planted when he was injured, during a one-time excursion out of the ginning process and into an activity more akin to farming or agricultural labor, did not interrupt his compensation coverage. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

V. NUMBER OF EMPLOYEES.

Editor's Note. — The annotations under this analysis line below and in the main volume were decided prior to the 1987 amendment to subsection (b) of this section, decreasing the regular employment requirement from four to three.

Whether or not the minimum number, etc. —

The requirement that five (now three)

or more employees be regularly employed in the same business or establishment is jurisdictional. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

The plaintiff has the burden of proving that the employer regularly employed five (now three) or more employees. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

§ 97-17. Settlements allowed in accordance with Article.

CASE NOTES

Applied in Roberts v. Carolina Tables of Hickory, 76 N.C. App. 148, 331 S.E.2d 757 (1985).

§ 97-18. Prompt payment of compensation required; installments; notice to Commission; penalties.

CASE NOTES

Modification of Award prior to Filing of Closing Receipt. — A closing receipt, also called I.C. Form 28B, must be filed with the Commission. Until it is filed with and approved by the Commission, the Commission may continue to receive evidence and modify or add to a preliminary compensation award. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

Determination of Final Payment. — For purposes of § 97-47, the statutory one-year period for filing a claim for a change of condition begins at the time final payment is accepted, not when I.C. Form 28B is filed. Nonetheless, the Commission must be given the opportunity to determine whether a payment labeled "final" is or should be, in fact, the final payment. After this determination is made, the Commission accepts and approves a copy of Form 28B. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

Cited in Moretz v. Richards & Assocs., 316 N.C. 539, 342 S.E.2d 844 (1986).

§ 97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would have been liable; order of liability.

Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service less than four employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article

for the payment of compensation and other benefits under this Article on account of the injury or death of any such subcontractor, any principal or partner of such subcontractor or any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any such subcontractor, any principal or partner of such subcontractor, or any employee of such subcontractor for compensation or other benefits under this Article. The Industrial Commission, upon demand shall furnish such certificate, and may charge therefor the cost thereof, not to exceed twenty-five cents (25¢).

Any principal contractor, intermediate contractor, or subcontractor paying compensation or other benefits under this Article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons or corporation who independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer.

The principal or owner may insure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor. (1929, c. 120, s. 19; 1941, c. 358, s. 1; 1945, c. 766; 1973, c. 1291, s. 10; 1979, c. 247, s. 2; 1987, c. 729, s. 4.)

Effect of Amendments. — The 1987 amendment, effective August 5, 1987, inserted "any such subcontractor, any principal or partner of such subcontractor or" in the first and second sentences of the first paragraph.

CASE NOTES

Editor's Note. — *The annotations under this section in the main volume were decided prior to the 1987 amendment, which increased the scope of liability under this section.*

Stated in Dockery v. McMillan, — N.C. App. —, 355 S.E.2d 153 (1987).

§ 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

CASE NOTES

Obligation to support one's children is not a "debt" in the legal sense of the word; thus, a defendant can be required to pay child support out of his workers' compensation benefits. State v. Miller, 77 N.C. App. 436, 335 S.E.2d 187 (1985).

§ 97-22. Notice of accident to employer.

CASE NOTES

Claim Not Dismissed Where Insurer Had Actual Notice. — Where the defendant insurer had actual notice of the plaintiff employee's injury within 30 days, the defendant could not have been prejudiced by plaintiff's failure to give written notice; thus, there was no error in the Industrial Commission's not finding the plaintiff failed to give timely written notice or in its not dismissing plaintiff's claim for not giving timely written notice. Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985).

Where employee does not reasonably know of nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows, he has established "reasonable excuse" as that term is used in this section. Lawton v. County of Durham, — N.C. App. —, 355 S.E.2d 158 (1987).

Cited in Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985); Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501 (1986); Causby v. Bernhardt Furn. Co., 83 N.C. App. 650, 351 S.E.2d 106 (1986).

§ 97-23. What notice is to contain; defects no bar; notice personally or by registered letter or certified mail.

CASE NOTES

Cited in Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

§ 97-24. Right to compensation barred after two years; destruction of records.

CASE NOTES

Limited Jurisdiction of the Industrial Commission. —

In accord with main volume. See Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

The requirement that a claim be filed within, etc. —

In accord with 2nd paragraph in main volume. See Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

Party may be equitably estopped from asserting time limitation in this section as a bar to jurisdiction. Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

Cited in C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985); Lawton v. County of Durham, — N.C. App. —, 355 S.E.2d 158 (1987).

§ 97-25. Medical treatment and supplies.

CASE NOTES

I. IN GENERAL.

Where insurance company agreed to pay all necessary medical expenses incurred by plaintiff through May 31, 1983, while plaintiff waived any and all rights to reopen a claim for further compensation, and insurer was

notified on May 16, 1983, that plaintiff urgently needed medical attention relating to his industrial injury, but took no action and did not authorize the urgently needed hospitalization, defendant breached its duty of good faith and fair dealing by acting to delay the treatment until after May 31, 1983, and the case would be remanded to determine how soon after notification the insurance company could have reasonably granted the authorization and to determine what portion of the costs would have then occurred prior to May 31, 1983, for which defendant was liable. Gallimore v. Daniels Constr. Co., 78 N.C. App. 747, 338 S.E.2d 317 (1986).

Quoted in Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

Cited in McDonald v. Brunswick Elec. Membership Corp., 77 N.C. App. 753, 336 S.E.2d 407 (1985); Sawyer v. Ferebee & Son, 78 N.C. App. 212, 336 S.E.2d 643 (1985).

II. WHAT TREATMENT MUST BE PROVIDED.

The legislature's obvious intent in amending this section in 1973 by deleting the 10 week limitation with respect to medical treatments required to effect or cure or give relief was to compel employers to provide medical treatments reasonably required to "effect a cure or give relief" more than 10 weeks after the date of injury. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

Future Medical Expenses Not Limited to Those Lessening Period of Disability. — This section does not limit an employer's obligation to pay future medical expenses to those cases in which such expenses will lessen the period of disability. The statute also requires employers to pay the expenses of future medical treatments even if they will not lessen the period of disability, as long as they are reasonably required to (1) effect a cure, or (2) give relief. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

"Relief". — "Relief" embraces not only an affirmative improvement towards an injured employee's health, but also the prevention or mitigation of further decline in that health due to the compensable injury. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

Treatment to Prevent Further Decline. — As a result of the 1973 amendment to this section, employers must provide treatments reasonably required more than 10 weeks after an injury to prevent an employee's health from further declining. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

Future expenses incurred to monitor an employee's medical condition are reasonably required to give relief if there is a substantial risk that the employee's condition may take a turn for the worse. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

V. SELECTION OF PHYSICIAN BY EMPLOYEE.

Failure to obtain approval for payments of medical expenses does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 97-26. Liability for medical treatment measured by average cost in community; malpractice of physician.

CASE NOTES

Cited in Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832 (1986).

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

CASE NOTES

Remand Where Findings Fail to Determine Justification for Refusal. — Where the findings of fact of the Industrial Commission fail to determine whether the circumstances justified the plaintiff's refusal to submit to medical procedures, the case must be remanded to the Industrial Commission for determination of whether the plaintiff's refusal to undergo the procedures was reasonable under the circumstances. Hooks v. Eastway Mills, Inc., 315 N.C. 657, 335 S.E.2d 898 (1985).

§ 97-28. Seven-day waiting period; exceptions.

No compensation, as defined in G.S. 97-2(11), shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in G.S. 97-25. Provided however, that in the case the injury results in disability of more than 21 days, the compensation shall be allowed from the date of the disability. Nothing in this section shall prevent an employer from allowing an employee to use paid sick leave, vacation or annual leave, or disability benefits provided directly by the employer during the first seven calendar days of disability. (1929, c. 120, s. 28; 1983, c. 599; 1987, c. 729, s. 5.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "21 days" for "28 days" in the second sentence.

§ 97-29. Compensation rates for total incapacity.

Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66 $^{2}/_{3}$%) of his average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars ($30.00) per week.

In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care or rehabilitative services shall be paid for by the employer during the lifetime of the injured employee. If death results from the injury then the employer shall pay compensation in accordance with the provisions of G.S. 97-38.

The weekly compensation payment for members of the North Carolina national guard and the North Carolina State guard shall be the maximum amount established annually in accordance with the last paragraph of this section per week as fixed herein. The weekly compensation payment for deputy sheriffs, or those acting in the capacity of deputy sheriff, who serve upon a fee basis, shall be thirty dollars ($30.00) a week as fixed herein.

An officer or member of the State Highway Patrol shall not be awarded any weekly compensation under the provisions of this section for the first two years of any incapacity resulting from an injury by accident arising out of and in the course of the performance by him of his official duties if, during such incapacity, he continues to be an officer or member of the State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled under the provisions of this Article.

Notwithstanding any other provision of this Article, beginning August 1, 1975, and on July 1 of each year thereafter, a maximum weekly benefit amount shall be computed. The amount of this maximum weekly benefit shall be derived by obtaining the average weekly insured wage in accordance with G.S. 96-8(22), by multiplying such average weekly insured wage by 1.10, and by rounding such figure to its nearest multiple of two dollars ($2.00), and this said maximum weekly benefit shall be applicable to all injuries and claims arising on and after January 1 following such computation. Such maximum weekly benefit shall apply to all provisions of this Chapter effective August 1, 1975, and shall be adjusted July 1 and effective January 1 of each year thereafter as herein provided. (1929, c. 120, s. 29; 1939, c. 277, s. 1; 1943, c. 502, s. 3; c. 543; c. 672, s. 2; 1945, c. 766; 1947, c. 823; 1949, c. 1017; 1951, c. 70, s. 1; 1953, c. 1135, s. 1; c. 1195, s. 2; 1955, c. 1026, s. 5; 1957, c. 1217; 1963, c. 604, s. 1; 1967, c. 84, s. 1; 1969, c. 143, s. 1; 1971, c. 281, s. 1; c. 321, s. 1; 1973, c. 515, s. 1; c. 759, s. 1; c. 1103, s. 1; c. 1308, ss. 1, 2; 1975, c. 284, s. 4; 1979, c. 244; 1981, c. 276, s. 2; c. 378, s. 1; c. 421, s. 3; c. 521, s. 2; c. 920, s. 1; 1987, c. 729, s. 6.)

Effect of Amendments. — The 1987 amendment, effective August 1, 1987, and applicable to all accidents occurring on or after January 1, 1988, inserted "by multiplying such average weekly insured wage by 1.10" in the second sentence of the final paragraph.

CASE NOTES

I. IN GENERAL.

Legislative Intent. — The legislature's expansion of this section in 1973 reflects an obvious intent to address the plight of a worker who suffers an injury permanently abrogating his earning ability. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

This section and § 97-30 are mutually exclusive. A claimant cannot simultaneously be both totally and partially incapacitated. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Construction with § 97-31. — In all cases in which compensation is sought under this section or § 97-30, total or partial disablement must be shown; however, if compensation is sought in the alternative under § 97-31, disablement is presumed from the injury and compensation is accordingly based on the schedule. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

When all of an employee's injuries are included in the schedule set out in § 97-31, the employee's entitlement to compensation is exclusively under that section. However, if an employee receives an injury which is compensable and the injury causes him to become so emotionally disturbed that he is unable to work, he is entitled to compensation for total incapacity under this section. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

Where all of a worker's injuries are compensable under § 97-31, the compensation provided for under that section is in lieu of all other compensation. When, however, an employee cannot be fully compensated under § 97-31 and is

permanently incapacitated, he or she is entitled to compensation under this section for total incapacity or under § 97-30 for partial incapacity. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

An employee who suffers an injury scheduled in § 97-31 may recover compensation under this section instead of § 97-31 if he is totally and permanently disabled. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

The "in lieu of" clause in § 97-31 does not prevent a worker who qualifies from recovering lifetime benefits under this section. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986), overruling Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978), to the extent it holds otherwise.

Plaintiff, who suffered a fall causing a permanent partial impairment to his back of 20% and whom the Commission found unable to work at his previous job as a nurse or at any other employment, was totally and permanently disabled and was entitled to recover under this section, and was not limited to recovery under § 97-31. Taylor v. Margaret R. Pardee Mem. Hosp., 83 N.C. App. 385, 350 S.E.2d 148 (1986).

Even if all injuries are covered under § 97-31, the scheduled injury section, an employee may nevertheless elect to claim under this section if this section is more favorable, but he may not recover under both sections. Hill v. Hanes Corp., — N.C. —, 353 S.E.2d 392 (1987).

An employee may be compensated for both a scheduled compensable injury under § 97-31 and total incapacity for work under this section when the total incapacity is caused by a psychiatric disorder brought on by the scheduled injury. Hill v. Hanes Corp., — N.C. —, 353 S.E.2d 392 (1987).

If a claimant is totally and permanently disabled within the meaning of this section, then he is not limited to a recovery under the schedule of compensation of § 97-31. Mitchell v. Fieldcrest Mills, Inc., — N.C. App. —, 353 S.E.2d 638 (1987).

Where claimant is totally disabled as a result of injuries not included in § 97-31 schedule, claimant is entitled to an award for total disability under this section. Weaver v. Swedish Imports Maintenance, Inc., — N.C. —, 354 S.E.2d 477 (1987).

Worker May Select More Favorable Remedy. — This section is an alternative source of compensation for an employee who suffers an injury which is also included in the schedule, and the worker may select the more favorable remedy. Wilder v. Barbour Boat Works, — N.C. App. —, 352 S.E.2d 690 (1987).

This section and § 97-31 are alternate sources of compensation for an employee who suffers a disabling injury which is also included as a scheduled injury. The injured worker is allowed to select the more favorable remedy, but he cannot recover compensation under both sections. Cockman v. PPG Indus., 84 N.C. App. 101, 351 S.E.2d 771 (1987).

When an injury to the back causes referred pain to the extremities of the body and this pain impairs the use of the extremities, then the award of workers' compensation must take into account such impairment. Harmon v. Public Serv. of N.C., Inc., 81 N.C. App. 482, 344 S.E.2d 285, cert. denied, 318 N.C. 415, 349 S.E.2d 595 (1986).

Where an employee is properly determined to be totally and permanently disabled under this section, § 97-32 has no application. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Claimant Unable to Earn Wages in Any Job for Which Qualified Was Totally, Not Partially, Disabled. — The Commission erred as a matter of law by awarding claimant compensation for partial disability when it found as fact that plaintiff was incapable of earning wages in any employment for which plaintiff was qualified. Based on the Commission's findings, plaintiff was totally disabled within the meaning of this section. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Occupational Disease Is Not Compensable Until It Causes Incapacity to Work. — An occupational disease does not become compensable under this section (relating to total incapacity) or § 97-30 (relating to partial incapacity) until it causes incapacity for work. This incapacity is the basic "loss" for which the worker receives compensation. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

Fact that plaintiff can perform sedentary work does not in itself preclude the Commission from making an award for total disability if it finds upon supporting evidence that plaintiff, because of other preexisting limitations,

is not qualified to perform the kind of sedentary jobs that might be available in the marketplace. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Where occupational lung disease incapacitates an employee from all but sedentary employment, and because of the employee's age, limited education or work experience no sedentary employment for which the employee is qualified exists, the employee is entitled to compensation for total disability. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

The relevant injury, etc. —

If preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone who is younger or who possesses superior education or work experience. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Remand for Findings as to Other Employment for Which Qualified. — Where the Commission found that plaintiff had chronic obstructive pulmonary disease caused in part by her exposure to respirable cotton dust during her employment, but that her impairment was not sufficient to render plaintiff incapable of performing types of employment which did not require very strenuous activity or exposure to cotton dust, but the Commission's findings did not address evidence that due to plaintiff's education, age and experience she was probably not capable of earning wages in any employment which did not require substantial physical exertion, the case was remanded for appropriate findings and conclusions of plaintiff's capacity to earn wages in employment for which she might be qualified. Webb v. Pauline Knitting Indus., 78 N.C. App. 184, 336 S.E.2d 645 (1985).

Wheelchair Accessible Residence. — The employer's obligation to furnish "other treatment or care" may include the duty to furnish alternate, wheelchair accessible housing. Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

Evidence that plaintiff's present rented home had not been modified to accommodate his wheelchair, that the owners would not permit such modification, and that plaintiff could not enter the bathroom or kitchen and thus could not use the bath or toilet facilities or prepare meals for himself supported the Commission's finding of fact that plaintiff's present residence was not satisfactory and its award for wheelchair accessible housing. Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

Specially Equipped Van. — Neither the phrase "other treatment or care" nor the term "rehabilitative services" in this section can reasonably be interpreted to include a specially equipped van. McDonald v. Brunswick Elec. Membership Corp., 77 N.C. App. 753, 336 S.E.2d 407 (1985), affirming the Commission's opinion and award, however, to the extent that it required defendants to reimburse plaintiff for the cost of special adaptive equipment in his specially equipped van.

Evidence held sufficient to support the Commission's award of compensation for temporary total disability based on stress-induced depression resulting from injury. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

Where physician testified that plaintiff suffered continuous pain in his back, both hips, and legs and continuous numbness of the right foot, and that he was 100% disabled, and opined that plaintiff's pain was caused by the use of his back in coordination with his hips and legs, the Commission could determine that plaintiff would not be totally compensated for his injuries under § 97-31 and that, as a result, he was entitled to compensation for permanent total incapacity under this section. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Plaintiff, who received temporal total disability benefits under this section for a compensable heart attack in April, 1979, was properly awarded permanent partial disability under § 97-30 on his application under § 97-47 for modification of the prior award following three additional heart attacks, where the Commission found that he had been permanently and totally disabled since June, 1981, partially as a result of his compensable heart attack in 1979. Weaver v. Swedish Imports Mainte-

nance, Inc., — N.C. App. —, 343 S.E.2d 205 (1986).

Defendants Held Not Entitled to Credit for Scheduled Award. — Where temporary total disability payments for stress-induced depression resulting from injury were to begin approximately six months after the final payment on the scheduled award for permanent partial disability, the defendants would not be given credit on the compensation awarded for temporary total disability for compensation previously awarded under § 97-31(15). Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

Applied in Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Cited in Lumley v. Dancy Constr. Co., 79 N.C. App. 114, 339 S.E.2d 9 (1986); Moretz v. Richards & Assocs., 316 N.C. 539, 342 S.E.2d 844 (1986); Costner v. A.A. Ramsey & Sons, 81 N.C. App. 121, 343 S.E.2d 607 (1986); Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986); Gupton v. Builders Transp., 83 N.C. App. 1, 348 S.E.2d 601 (1986); Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

II. PERMANENT AND TOTAL DISABILITY.

Depression Caused by Injury. — Evidence held sufficient to support the Commission's conclusion that employee was entitled to compensation under this section for total disability due to stress induced depression caused by on-the-job physical injuries which rendered him totally disabled. Hill v. Hanes Corp., — N.C. —, 353 S.E.2d 392 (1987).

Aggravation of Latent Condition. — When a pre-existing, nondisabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability, even though it would not have disabled a normal person to that extent. In such a case, where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the pre-existing condition will not be weighed. Wilder v. Barbour Boat Works, — N.C. App. —, 352 S.E.2d 690 (1987).

Evidence held to clearly indicate that plaintiff's 1983 injury to his leg aggravated a latent condition due to an unrelated 1977 injury and therefore proximately contributed to his total disability. Although a normal person may not have been disabled to that extent, plaintiff's entire disability was compensable. Wilder v. Barbour Boat Works, — N.C. App. —, 352 S.E.2d 690 (1987).

Apportionment Held Necessary. — Where it is clear that claimant's permanent and total disability was only partially a result of the initial compensable heart attack, the award must be apportioned to reflect the extent to which claimant's permanent total disability was caused by the compensable heart attack. Weaver v. Swedish Imports Maintenance, Inc., — N.C. —, 354 S.E.2d 477 (1987).

§ 97-30. Partial incapacity.

CASE NOTES

This section and § 97-29 are mutually exclusive. A claimant cannot simultaneously be both totally and partially incapacitated. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Section 97-31 Compared. — In all cases in which compensation is sought under § 97-29 or this section, total or partial disablement must be shown; however, if compensation is sought in the alternative under § 97-31, disablement is presumed from the injury and compensation is accordingly based on the schedule. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Injuries Also Entitling Employee to Compensation under § 97-31. — Where all of a worker's injuries are compensable under § 97-31, the compensation provided for under that section is in lieu of all other compensation. When, however, an employee cannot be fully compensated under § 97-31 and is permanently incapacitated, he or she is entitled to compensation under § 97-29 for total incapacity or this section for

partial incapacity. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Occupational Disease Is Not Compensable Until It Causes Incapacity for Work. — An occupational disease does not become compensable under §§ 97-29 (relating to total incapacity) or this section (relating to partial incapacity) until it causes incapacity for work. This incapacity is the basic "loss" for which the worker receives compensation under those statutes. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

Amount of Benefit. — Subject to the limitations and percentages stated in the statute in partial disability cases, the weekly benefit due is based on the difference between the employee's average weekly wage before the injury and average weekly wage which he is able to earn thereafter. Thomason v. Fiber Indus., 78 N.C. App. 159, 336 S.E.2d 632 (1985).

Where the evidence tended to show that plaintiff was permanently partially disabled by reason of occupational disease and that after failing to obtain employment in the cotton textile industry in which he had been employed for 29 years, the plaintiff made an earnest and highly commendable search for other employment, and was able to obtain a permanent job with a restaurant at the minimum wage but was released from that employment only because business conditions resulted in the restaurant going out of business, the Commission was required to enter an award setting the plaintiff's compensation at two-thirds of the difference between his average wage of $196.91 a week while working for the defendant and the minimum wage of $134.00 a week which he received thereafter, an award of $41.94 per week, not to exceed 300 weeks. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

The Commission did not err in allowing defendants a credit only for the wages actually earned by employee after he was found to be disabled, as implicit in the Commission's finding that employee was entitled to compensation at two-thirds the difference between his wages prior to disability and his average weekly wages immediately thereafter was a finding that the wages actually earned by the employee after he was found to be disabled were the wages he was capable of earning. Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986), remanding, however, for further findings so that the exact amount of credit could be set and compensation could be properly calculated.

Entitlement to Partial Disability Compensation Shown. — Plaintiff, who received temporary total disability benefits under § 97-29 for a compensable heart attack in April, 1979, was properly awarded permanent partial disability under this section on his application under § 97-47 for modification of the prior award following three additional heart attacks, where the Commission found that he had been permanently and totally disabled since June 1981, partially as a result of his compensable heart attack in 1979. Weaver v. Swedish Imports Maintenance, Inc., 80 N.C. App. 432, 343 S.E.2d 205 (1986).

Individual who retired from job in which he had 47 years of experience at age 70, and subsequently attempted to return to work but could not obtain comparable employment, was entitled to partial disability compensation based on the difference between his present and former wages, in view of environmental restriction, caused by his occupational disease (COPD), which combined with other factors to limit the scope of his potential employment. Preslar v. Cannon Mills Co., 80 N.C. App. 610, 343 S.E.2d 209 (1986).

Applied in Weaver v. Swedish Imports Maintenance, Inc., — N.C. —, 354 S.E.2d 477 (1987).

Cited in Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986); Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986); Gupton v. Builders Transp., 83 N.C. App. 1, 348 S.E.2d 601 (1986); Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986); Hill v. Hanes Corp., — N.C. —, 353 S.E.2d 392 (1987).

§ 97-31. Schedule of injuries; rate and period of compensation.

In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disabilty shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:

(21) In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed twenty thousand dollars ($20,000). In case of enucleation where an artificial eye cannot be fitted and used, the Industrial Commission may award compensation as for serious facial disfigurement.

(24) In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars ($20,000). (1929, c. 120, s. 31; 1931, c. 164; 1943, c. 502, s. 2; 1955, c. 1026, s. 7; 1957, c. 1221; c. 1396, ss. 2, 3; 1963, c. 424, ss. 1, 2; 1967, c. 84, s. 3; 1969, c. 143, s. 3; 1973, c. 515, s. 3; c. 759, s. 3; c. 761, ss. 1, 2; 1975, c. 164, s. 1; 1977, c. 892, s. 1; 1979, c. 250; 1987, c. 729, ss. 7, 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 5, 1987, substituted "twenty thousand dollars ($20,000)" for "ten thousand dollars ($10,000)" at the end of the first sentence of subdivision (21) and at the end of subdivision (24).

CASE NOTES

I. IN GENERAL.

Purpose of Schedule Is to Expand Employee's Remedies. — Although this section relieves an employee from proving diminished earning capacity for injuries caused thereunder, it was not intended to mean that the presumption of reduced earning capacity should be used to the employee's detriment. The purpose of the schedule was to expand, not restrict, the employee's remedies. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

Disablement Presumed. — In all cases in which compensation is sought under § 97-29 or § 97-30, total or partial disablement must be shown; however, if compensation is sought in the alternative under this section, disablement is presumed from the injury and compensation is accordingly based on the schedule. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

To obtain an award of benefits under any subsection of this section, a specific showing that the claimant has undergone a diminution in wage-earning capacity is not required; instead, disability is presumed from the fact of injury. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

This section is a schedule of losses for which compensation is payable even if a claimant does not demonstrate loss of wage-earning capacity. Losses included in the schedule are conclusively presumed to diminish wage-earning ability. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Purpose of "In Lieu of" Clause. — The legislature enacted the "in lieu of" clause in this section to express its intent not to permit compensation for both loss and disfigurement of body parts. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

The "in lieu of" clause of this section acts to prevent double recovery of bene-

fits under different sections of the Workers' Compensation Act, but it does not provide for an exclusive remedy. Mitchell v. Fieldcrest Mills, Inc., — N.C. App. —, 353 S.E.2d 638 (1987).

Applicability of "In Lieu of" Provisions. — The "in lieu of" provisions of this section, the scheduled injury statute, apply only when all the employee's injuries fall within those set out in the schedule. Hill v. Hanes Corp., — N.C. —, 353 S.E.2d 392 (1987).

Section Construed with § 97-29. — An employee who suffers an injury scheduled in this section may recover compensation under § 97-29 instead of under this section if he is totally and permanently disabled. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

The "in lieu of" clause in this section does not prevent a worker who qualifies from recovering lifetime benefits under § 97-29. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986), overruling Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978), to the extent it holds otherwise.

Section 97-29 and this section are alternate sources of compensation for an employee who suffers a disabling injury which is also included as a scheduled injury. The injured worker is allowed to select the more favorable remedy, but he cannot recover compensation under both sections. Cockman v. PPG Indus., 84 N.C. App. 101, 351 S.E.2d 771 (1987).

Even if all injuries are covered under this section, the scheduled injury section, an employee may nevertheless elect to claim under § 97-29 if § 97-29 is more favorable, but he may not recover under both sections. Hill v. Hanes Corp., — N.C. —, 353 S.E.2d 392 (1987).

If a claimant is totally and permanently disabled within the meaning of § 97-29, then that claimant is not limited to a recovery under the schedule of compensation of this section. Mitchell v. Fieldcrest Mills, Inc., — N.C. App. —, 353 S.E.2d 638 (1987).

Where claimant is totally disabled as a result of injuries not included in § 97-31 schedule, claimant is entitled to an award for total disability under § 97-29. Weaver v. Swedish Imports Maintenance, Inc., — N.C. —, 354 S.E.2d 477 (1987).

Injuries Enumerated in Schedule, etc. —

When all of an employee's injuries are included in the schedule set out in this section, the employee's entitlement to compensation is exclusively under that section. However, if an employee receives an injury which is compensable and the injury causes him to become so emotionally disturbed that he is unable to work, he is entitled to compensation for total incapacity under § 97-29. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

Where all of the employee's injuries are compensable under this section, compensation is limited to an award under this section, regardless of the employee's inability or diminished ability to earn wages. Gupton v. Builders Transp., 83 N.C. App. 1, 348 S.E.2d 601 (1986).

Where all of a worker's injuries are not included, etc. —

Where all of a worker's injuries are compensable under this section, the compensation provided for under this section is in lieu of all other compensation. When, however, an employee cannot be fully compensated under this section and is permanently incapacitated, he or she is entitled to compensation under § 97-29 for total incapacity or § 97-30 for partial incapacity. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122 (1986).

Award under § 97-29 Upheld. — Where physician testified that plaintiff suffered continuous pain in his back, both hips, and legs and continuous numbness of the right foot, and that he was 100% disabled, and opined that plaintiff's pain was caused by the use of his back in coordination with the hips and the legs, the Commission could determine that plaintiff would not be totally compensated for his injuries under this section and that, as a result, he was entitled to compensation for permanent total incapacity under § 97-29. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Plaintiff, who suffered a fall causing a permanent partial impairment to his back of 20% and whom the Commission found unable to work at his previous job as a nurse or at any other employment, was totally and permanently disabled and was entitled to recover under § 97-29, and was not limited to recovery under this section. Taylor v. Margaret R. Pardee Mem. Hosp., 83 N.C. App. 385, 350 S.E.2d 148 (1986).

Plaintiff, who sustained a 30% permanent physical impairment of his left leg as a result of a 1977 leg condition, and a 15% permanent physical impairment of the left leg as a result of a December, 1983 job related accident, was not limited to recovery under this section. Wilder v. Barbour Boat Works, — N.C. App. —, 352 S.E.2d 690 (1987).

An employee may be compensated for both a scheduled compensable injury under this section and total incapacity for work under § 97-29 when the total incapacity is caused by a psychiatric disorder brought on by the scheduled injury. Hill v. Hanes Corp., — N.C. —, 353 S.E.2d 392 (1987).

Section 97-52 Does Not Require Showing of Disability. — The obvious intent of the Legislature in enacting § 97-52 was to permit and not restrict recovery for occupational diseases. Section 97-52, therefore, does not require that disability be shown as a condition to recovery under the schedule for occupational disease in this section. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Words "disablement or death" in § 97-52 merely describe a condition that must occur before recovery may be had under § 97-29. They do not predicate recovery under this section upon disability. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Pain. — Pain is not in and of itself a compensable injury. Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Pain, rather than being itself an injury, is a manifestation or indication of an injury. Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Finding that plaintiff experienced pain as a result of what occurred while she was performing her duties was not a sufficient finding that plaintiff sustained an injury. Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

When Healing Period Terminates.—

Where plaintiff's "healing period" had stabilized and he had reached his maximum recovery by December 1977, it was this date that marked the termination of his compensation for temporary total disability and the initiation of compensation for permanent disability. And where according to the payment schedule of this section and in accord with the findings of the Commission, plaintiff was entitled to 180 weeks of permanent disability payments, and plaintiff had received nearly 255 weeks of disability payments since that date, plaintiff had already received more than he was entitled by statute to receive, and defendants owed plaintiff no additional compensation. Moretz v. Richards & Assocs., 316 N.C. 539, 342 S.E.2d 844 (1986).

Defendants Held Not Entitled to Credit for Scheduled Award. — Where temporary total disability payments for stress-induced depression resulting from injury were to begin approximately six months after the final payment on the scheduled award for permanent partial disability, the defendants would not be given credit on the compensation awarded for temporary total disability for compensation previously awarded under subdivision (15) of this section. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

Survivor Held Not Entitled to Benefits. — The dependent of a deceased employee who, prior to his death, was receiving benefits for permanent disability under subdivision (17) of this section, due to an injury that occurred prior to July 1, 1979, the effective date of the 1979 amendment, was not entitled to receive payments under the Workers' Compensation Act as a survivor. Costner v. A.A. Ramsey & Sons, 81 N.C. App. 121, 343 S.E.2d 607 (1986), aff'd, 318 N.C. 687, 351 S.E.2d 299 (1987).

Cited in McDonald v. Brunswick Elec. Membership Corp., 77 N.C. App. 753, 336 S.E.2d 407 (1985); Lumley v. Dancy Constr. Co., 79 N.C. App. 114, 339 S.E.2d 9 (1986); Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986); Joyner v. Rocky Mount Mills, — N.C. App. —, 355 S.E.2d 161 (1987).

V. EYES.

Eye Injury with Significant Risk of Future Vision Impairment. — While an employee who suffered a laceration of his cornea when a piece of metal hit his eye, presenting a clear danger of retinal detachment in the future, unquestionably sustained a permanent injury to his eye, he did not lose the injured eye or suffer any loss of vision. Since his injury was not specifically encompassed by subdivisions (16) or (19) of this section, or any other subdivision, subdivision (24)

was the appropriate basis for the Commission's award. Little v. Penn Ventilator Co., 75 N.C. App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985), aff'd in part and rev'd in part, 317 N.C. 206, 345 S.E.2d 204 (1986).

While the evidence tended to support the claim of an employee suffering an eye injury that his risk of some form of future vision impairment was significantly increased, the statutory scheme allowed him to be compensated for "permanent injury," but made no provision for an additional recovery because the claimant could be subject to a greater risk of permanent disability as a result of his accident. Consequently, the amount awarded — $2,500 — was supported by the evidence. Little v. Penn Ventilator Co., 75 N.C. App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985), aff'd in part and rev'd in part, 317 N.C. 206, 345 S.E.2d 204 (1986).

Eye Injury without Immediate Loss of Vision Compensated under Subdivision (24). — Where plaintiff received a serious, permanent eye injury which placed him at great risk for future complications, although he had not yet suffered any loss of vision nor any decrease in earning ability, and the extent of his future complications as well as his prognosis if they should arise lay outside the realm of certainty, the Commission's award of $2,500.00 for plaintiff's eye injury under subdivision (24) of this section would be affirmed. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

A 7% loss of field of vision in plaintiff's right eye was compensable under subdivisions (16) and (19) of this section. Gupton v. Builders Transp., 83 N.C. App. 1, 348 S.E.2d 601 (1986).

VII. DISFIGUREMENT.

Recovery for Disfigurement Is in Addition to Other Recovery. — Subdivision (21) of this section, when properly read, means that a person may recover for serious facial and head disfigurement in addition to recovery under other parts of the section. Griffin v. Red & White Supermarket, 78 N.C. App. 617, 337 S.E.2d 657 (1985).

Scars Not Visible during Normal Employment. — Evidence did not support the Industrial Commission's award for serious disfigurement affecting plaintiff's future earning capacity where plaintiff's scars on the top of one of her breasts were not visible during her normal employment, plaintiff had affirmatively testified that she would not want a type of job where the scars might show, and she had returned to her former job without reduction in pay or apparent incident. Anderson v. Shoney's, 76 N.C. App. 158, 332 S.E.2d 93 (1985).

Enucleation where artificial eye cannot be fitted and used is a type of facial disfigurement under subdivision (21). No other type of eye injury is a compensable disfigurement. Griffin v. Red & White Supermarket, 78 N.C. App. 617, 337 S.E.2d 657 (1985).

VIII. BACK.

When an injury to the back causes referred pain to the extremities of the body, and this pain impairs the use of the extremities, then the award of workers' compensation must take into account such impairment. Harmon v. Public Serv. of N.C., Inc., 81 N.C. App. 482, 344 S.E.2d 285, cert. denied, 318 N.C. 415, 349 S.E.2d 595 (1986).

IX. IMPORTANT ORGANS.

"Loss" as used in subdivision (24) includes loss of use. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Awards under subdivision (24) are equitable in nature and within the Industrial Commission's discretion. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Discretion of Commission. — By employing the word "may" in subdivision (24) of this section, the legislature intended to give the Industrial Commission discretion whether to award compensation under that section. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

The decision regarding the amount of compensation under subdivision (24) of this section should be left to the sound discretion of the Industrial Commission. Its decision will not be overturned on appeal absent an abuse of discretion on its part. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

Amount of Award Is Within Commission's Discretion. — While the amount of compensation for most injuries under this section is determined according to a statutory formula, compensation for injuries under subdivision (24) appears to be within the discretion of the Commission, provided that the amount

of the award does not exceed the $10,000 (now $20,000) ceiling. Little v. Penn Ventilator Co., 75 N.C. App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985), aff'd in part and rev'd in part, 317 N.C. 206, 345 S.E.2d 204 (1986).

Consideration of Earning Capacity. —

An employee is not required to establish a diminution of wage earning capacity under subdivision (24) of this section, although it may be considered in setting the amount of the award. Little v. Penn Ventilator Co., 75 N.C. App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985), aff'd in part and rev'd in part, 317 N.C. 206, 345 S.E.2d 204 (1986).

Remand for Findings as to Capacity for Other Employment. — Where the Commission found that plaintiff had chronic obstructive pulmonary disease caused in part by her exposure to respirable cotton dust during her employment, but that her impairment was not sufficient to render plaintiff incapable of performing types of employment which did not require very strenuous activity or exposure to cotton dust, but the Commission's findings did not address evidence that due to plaintiff's education, age and experience she was probably not capable of earning wages in any employment which did not require substantial physical exertion, the case would be remanded for appropriate findings and conclusions of plaintiff's capacity to earn wages in employment for which she might be qualified. Webb v. Pauline Knitting Indus., 78 N.C. App. 184, 336 S.E.2d 645 (1985).

Loss of Sense of Smell and Damage to Nerves and Muscles of Face. — It is true that no provision of the Act specifies the payment of benefits due to the loss of a sense of smell or damages to the nerves and muscles of an employee's face. However, benefits are awarded under subdivision (24) for loss of a permanent injury to important external or internal organs or parts of the body, and the Commission properly used subdivision (24) in awarding benefits. Proof of diminished wage-earning capacity is not required under subdivision (24). Stanley v. Gore Bros., 82 N.C. App. 511, 347 S.E.2d 49 (1986).

Claim for compensation due to an alleged loss of the sense of smell and damage to the nerves and muscles in the right side of face was not barred by the passage of time and the doctrine of res judicata, where these symptoms did not manifest themselves immediately after the accident, and the first opinion and award filed in the matter covered only claimant's loss of vision and the disfigurement of his face. Stanley v. Gore Bros., 82 N.C. App. 511, 347 S.E.2d 49 (1986).

Lungs. —

An award for partial loss of lung function falls within the scope of subdivision (24) of this section. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

There is no statutory justification for excluding loss of or permanent injury to the lungs resulting from occupational disease from the coverage of subdivision (24) of this section, and no statutory justification for making a specific finding of disability a condition precedent for recovery thereunder. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Occupational Disease. —

The Legislature intended for this section to apply to occupational disease. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

The Legislature must have intended for occupational disease to be compensable under the schedule in this section or it would not have expressly provided that medical treatments be provided both in cases of disability and in cases of damage to organs. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

CASE NOTES

The purpose of this section, etc. — One purpose of this section is to prevent a partially disabled employee from refusing employment within the em-

ployee's capacity in an effort to increase the amount of compensation payable to the employee. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Where an employee is properly determined to be totally and permanently disabled under § 97-29, this section has no application. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

§ 97-33. Prorating in event of earlier disability or injury.

CASE NOTES

This section is designed, etc. — In accord with the main volume. See Wilder v. Barbour Boat Works, — N.C. App. —, 352 S.E.2d 690 (1987).

Inapplicability of Section, etc. — Where plaintiff's condition stemmed neither from epilepsy nor from an injury received in the armed services or in the course of other employment, and where plaintiff had received no compensation for the injury, his case did not fall within the provisions of this section. Wilder v. Barbour Boat Works, — N.C. App. —, 352 S.E.2d 690 (1987).

§ 97-38. Where death results proximately from compensable injury or occupational disease; dependents; burial expenses; compensation to aliens; election by partial dependents.

If death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 $^{2}/_{3}$%) of the average weekly wages of the deceased employee at the time of the accident, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29, nor less than thirty dollars ($30.00), per week, and burial expenses not exceeding two thousand dollars ($2,000), to the person or persons entitled thereto as follows:

(1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.

(2) If there is no person wholly dependent, then any person partially dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive a weekly payment of compensation computed as hereinabove provided, but such weekly payment shall be the same proportion of the weekly compensation provided for a whole dependent as the amount annually

contributed by the deceased employee to the support of such partial dependent bears to the annual earnings of the deceased at the time of the accident.

(3) If there is no person wholly dependent, and the person or all persons partially dependent is or are within the classes of persons defined as "next of kin" in G.S. 97-40, whether or not such persons or such classes of persons are of kin to the deceased employee in equal degree, and all so elect, he or they may take, share and share alike, the commuted value of the amount provided for whole dependents in (1) above instead of the proportional payment provided for partial dependents in (2) above; provided, that the election herein provided may be exercised on behalf of any infant partial dependent by a duly qualified guardian; provided, further, that the Industrial Commission may, in its discretion, permit a parent or person standing in loco parentis to such infant to exercise such option in its behalf, the award to be payable only to a duly qualified guardian except as in this Article otherwise provided; and provided, further, that if such election is exercised by or on behalf of more than one person, then they shall take the commuted amount in equal shares.

When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments. Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18.

Compensation payable under this Article to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amounts as provided for residents, except that dependents in any foreign country except Canada shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to the surviving father or mother whom the employee has supported, either in whole or in part, for a period of one year prior to the date of the injury; provided, that the Commission may, in its discretion, or, upon application of the employer or insurance carrier shall commute all future installments of compensation to be paid to such aliens to their present value and payment of one half of such commuted amount to such aliens shall fully acquit the employer and the insurance carrier. (1929, c. 120, s. 38; 1943, c. 163; c. 502, s. 5; 1947, c. 823; 1951, c. 70, s. 3; 1953, c. 53, s. 1; 1955, c. 1026, s. 8; 1957, c. 1217; 1963, c. 604, s. 3; 1967, c. 84, s. 4; 1969, c. 143, s. 4; 1971, c. 281, s. 3; 1973, c. 515, s. 4; c. 759, s. 4; c. 1308, ss. 3, 4; c. 1357, ss. 1, 2; 1977, c. 409; 1981, c. 276, s. 1; c. 378, s. 1; c. 379; 1983, c. 772, s. 1; 1987, c. 729, s. 9.)

Effect of Amendments. — The 1987 amendment, effective with respect to all death claims arising on or after August 5, 1987, substituted "compensable injury or occupational disease" for "the accident" in the catchline, substituted "a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, or whichever is later"

for "the accident and within two years thereafter, or while total disability still continues and within six years after the accident, or while total disability still continues and within two years of the final determination of total disability, whichever is later," and substituted "two thousand dollars ($2,000)" for "one thousand dollars ($1,000)" in the introductory paragraph.

Legal Periodicals. —

For note, "Winstead v. Derreberry: Stepchildren and the Presumption of Dependence Under the North Carolina Workers' Compensation Act," see 64 N.C.L. Rev. 1548 (1986).

CASE NOTES

Editor's Note. — *The annotations in the main volume under this section were decided prior to the 1987 amendment, which changed the time limit provisions in the first paragraph.*

I. IN GENERAL.

When Disability or Death Resulting from Disease Is Compensable. — Disability caused by, or death resulting from, a disease is compensable only when the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to the claimant's employment. Goodman v. Cone Mills Corp., 75 N.C. App. 493, 331 S.E.2d 261 (1985).

Stated in Costner v. A.A. Ramsey & Sons, 81 N.C. App. 121, 343 S.E.2d 607 (1986).

Cited in Elmore v. Broughton Hosp., 76 N.C App. 582, 334 S.E.2d 231 (1985).

II. DEPENDENTS.

Stepchildren must be substantially dependent, etc. —

In accord with 1st paragraph in main volume. See Capps v. Standard Trucking Co., 77 N.C. App. 448, 335 S.E.2d 357 (1985).

A stepchild must be factually "substantially" dependent upon the deceased in order to qualify as a child dependent on deceased under § 97-39 and, therefore, be entitled to a share of death benefits under this section. Capps v. Standard Trucking Co., 77 N.C. App. 448, 335 S.E.2d 357 (1985).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

Legal Periodicals. —

For note, "Winstead v. Derreberry: Stepchildren and the Presumption of Dependence Under the North Carolina Workers' Compensation Act," see 64 N.C.L. Rev. 1548 (1986).

CASE NOTES

Stepchildren must be substantially dependent, etc. —

In accord with 1st paragraph in main volume. See Capps v. Standard Trucking Co., 77 N.C. App. 448, 335 S.E.2d 357 (1985).

A stepchild must be factually "substantially" dependent upon the deceased in order to qualify as a child dependent on deceased under this section and, therefore, be entitled to a share of death benefits under § 97-38. Capps v. Standard Trucking Co., 77 N.C. App. 448, 335 S.E.2d 357 (1985).

§ 97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.

Subject to the provisions of G.S. 97-38, if the deceased employee leave neither whole nor partial dependents, then the compensation which would be payable under G.S. 97-38 to whole dependents shall be commuted to its present value and paid in a lump sum to the next of kin as herein defined. For purposes of this section and G.S. 97-38, "next of kin" shall include only child, father, mother, brother or sister of the deceased employee, including adult children or adult brothers or adult sisters of the deceased, but excluding a parent who has willfully abandoned the care and maintenance of his or her child and who has not resumed its care and maintenance at least one year prior to the first occurring of the majority or death of the child and continued its care and maintenance until its death or majority. For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section, the order of priority among them shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate. In the event of exclusion of a parent based on abandonment, the claim for compensation benefits shall be treated as though the abandoning parent had predeceased the employee. For all such next of kin who were also partially dependent on the deceased employee but who exercise the election provided for partial dependents by G.S. 97-38, the general law applicable to the distribution of the personal estate of persons dying intestate shall not apply and such person or persons upon the exercise of such election, shall be entitled, share and share alike, to the compensation provided in G.S. 97-38 for whole dependents commuted to its present value and paid in a lump sum.

If the deceased employee leaves neither whole dependents, partial dependents, nor next of kin as hereinabove defined, then no compensation shall be due or payable on account of the death of the deceased employee, except that the employee shall pay or cause to be paid the burial expenses of the deceased employee not exceeding two thousand dollars ($2,000) to the person or persons entitled thereto. (1929, c. 120, s. 40; 1931, c. 274, s. 5; c. 319; 1945, c. 766; 1953, c. 53, s. 2; c. 1135, s. 2; 1963, c. 604, s. 4; 1965, c. 419; 1967, c. 84, s. 5; 1971, c. 1179; 1981, c. 379; 1987, c. 729, s. 10.)

Effect of Amendments. — The 1987 amendment, effective August 5, 1987, substituted "two thousand dollars ($2,000)" for "one thousand dollars ($1,000)" in the second paragraph.

§ 97-42. Deduction of payments.

CASE NOTES

This section does not apply to fringe benefits or insurance proceeds of a contractual nature rather than being grounded in the workers' compensation law. Foster v. Western-Electric Co., 82 N.C. App. 656, 347 S.E.2d 471, cert. granted as to additional issues, 318 N.C. 506, 349 S.E.2d 859 (1986).

Even When They Are Coordinated with Workers' Compensation. — The fact that benefits under a sickness and disability plan were coordinated with workers' compensation did not bring payments under the plan within the purview of this section. Foster v. Western-Electric Co., 82 N.C. App. 656, 347 S.E.2d 471, cert. granted as to additional issues, 318 N.C. 506, 349 S.E.2d 859 (1986).

A sickness and disability benefit plan is a fringe benefit designed to enhance the attractiveness of initial employment and to encourage loyalty and longevity after an employee is trained. Foster v. Western-Electric Co., 82 N.C. App. 656, 347 S.E.2d 471, cert. granted as to additional issues, 318 N.C. 506, 349 S.E.2d 859 (1986).

Employer Not Entitled to Credit for Payments under Sickness and Disability Plan. — As North Carolina does not have a specific statutory authorization to allow an employer a credit for disability payments made under a sickness and disability plan, the Industrial Commission did not err in denying the employer's motion for credit therefor. Foster v. Western-Electric Co., 82 N.C. App. 656, 347 S.E.2d 471, cert. granted as to additional issues, 318 N.C. 506, 349 S.E.2d 859 (1986).

Due and Payable Benefits Are Not Deductible. — This section expressly provides that payments made by the employer which were "due and payable" when made are not deductible. Once the employer has accepted an injury as compensable, benefits are "due and payable." Moretz v. Richards & Assocs., 316 N.C. 539, 342 S.E.2d 844 (1986).

Defendants Held Not Entitled to Deduction. — Where temporary total disability payments for stress-induced depression resulting from injury were to begin approximately six months after the final payment on the scheduled award for permanent partial disability, the defendants would not be given credit on award for temporary total disability for compensation previously awarded under § 97-31(15). Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

Where employer and carrier accepted plaintiff's injury as compensable, and initiated the payment of benefits, those payments were due and payable and were not deductible under the provisions of this section, so long as the payments did not exceed the amount determined by statute or by the Commission to compensate plaintiff for his injuries. Moretz v. Richards & Assocs., 316 N.C. 539, 342 S.E.2d 844 (1986).

§ 97-47. Change of condition; modification of award.

CASE NOTES

I. IN GENERAL.

This section cannot apply, etc.

The Industrial Commission's authority under this section is limited to the review of prior awards; thus the statute is inapplicable unless there has been a previous final award. Weaver v. Swedish Imports Maintenance, Inc., — N.C. —, 354 S.E.2d 477 (1987).

Continuing Jurisdiction. — It was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Absent Previous Award, etc. —

This section is inapplicable in cases in which there has been no previous final award. In such cases, jurisdiction re-

mains in the Commission pending termination of the case by a final award. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

The Commission must concern itself with the claimant's level of disability as it exists prior to and at the time of hearing. If a change occurs in the future rendering plaintiff capable of earning some wages, the statute affords defendants a remedy. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Power of Commission to Grant Rehearing. —

The Commission has the power to order a rehearing on the basis of newly discovered evidence. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The proper procedure to end, diminish or increase a compensation award previously issued is a motion to the Industrial Commission under this section. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

Where plaintiff's initial compensation award for temporary total disabilities was determined by agreement prior to the time plaintiff became fully aware of the extent of his injuries, and plaintiff's initial claim was closed upon the filing of Form 28B, the proper procedure for presenting plaintiff's claim for his alleged permanent disabilities was through the statutorily prescribed procedure for compensation for substantial change of condition. Chisholm v. Diamond Condominium Constr. Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986).

Agreement to pay compensation, etc. —

A validly executed Industrial Commission Form 21 agreement ("Agreement for Compensation for Disability") constitutes an "award" under the North Carolina Workers' Compensation Act. Apple v. Guilford County, — N.C. App. —, 353 S.E.2d 641 (1987).

Power to Set Aside Judgment. — The Industrial Commission has inherent power analogous to that conferred on courts by § 1A-1, Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a workers' compensation claim requires it. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Because the power to set aside a former judgment is vital to the proper functioning of the judiciary, the Legislature impliedly vested such power in the Commission in conjunction with the judicial power which the Legislature granted it to administer the Workers' Compensation Act. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act. The Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

On defendants' motion under § 1A-1, Rule 60(b)(6), seeking relief from Industrial Commission's award, the court would decline to circumvent the "due diligence" requirement of Rule 60(b)(2) by indiscriminately entertaining any and all "newly discovered evidence" under Rule 60(b)(6). Otherwise, Rule 60(b)(6) would become a vehicle for unsuccessful litigants to obtain automatic rehearings before the Commission without satisfying the requirements of this section. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

Quoted in Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Cited in Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986); Hill v. Hanes Corp., — N.C. —, 353 S.E.2d 392 (1987).

II. CHANGE OF CONDITION.

Where the Commission finds a fact in one hearing and evidence in a subsequent hearing shows that such finding was not correct, this will support a finding of a different fact which supports a finding of a change in condition. Hubbard v. Burlington Indus., 76 N.C. App. 313, 332 S.E.2d 746 (1985).

Change from Partial to Total Disability. — When the Commission finds on one occasion that a person is permanently partially disabled and on a later occasion finds, based on additional evidence, that the person is totally disabled, this supports a finding of a change in condition. Harmon v. Public Serv. of N.C., Inc., 81 N.C. 482, 344

S.E.2d 285, cert. denied, 318 N.C. 415, 349 S.E.2d 595 (1986).

Heart Attacks. — Where claimant's condition changed from temporary total disability following a heart attack to total and permanent disability following a third heart attack, this was a change in condition within the meaning of this section. Weaver v. Swedish Imports Maintenance, Inc., — N.C. —, 354 S.E.2d 477 (1987).

Formation of Scar Tissue Not Change in Condition. — Where plaintiff's condition remained essentially unchanged since his award, and the intensifying of plaintiff's physical problems was due to the scar tissue that infiltrated the area where the operation had been done, plaintiff's continued incapacity was therefore of the same kind and character as his incapacity at the time of the award, and was not a change of condition within the meaning of this section. Sawyer v. Ferebee & Son, 78 N.C. App. 212, 336 S.E.2d 643 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Where the harmful consequences, etc.

In accord with main volume, see Hand ex rel. Hand v. Fieldcrest Mills, Inc., — N.C. App. —, 355 S.E.2d 141 (1987).

Physician who did not examine plaintiff from December 1980 until September 1981, the date of the original award, would be unable to testify as to plaintiff's amount of disability at the time of the award, and thus his testimony would be incompetent as to whether plaintiff had suffered a change of condition since that time. Sawyer v. Ferebee & Son, 78 N.C. App. 212, 336 S.E.2d 643 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Commission's Finding Reviewable. — Whether the facts as found by the Commission amount to a change of condition pursuant to this section is a question of law and thus properly reviewable by the Supreme Court. Weaver v. Swedish Imports Maintenance, Inc., — N.C. —, 354 S.E.2d 477 (1987).

Modification of Award Upheld. — Plaintiff, who received temporary total disability benefits under § 97-29 for a compensable heart attack in April, 1979, was properly awarded permanent partial disability under § 97-30 on his application under this section for modification of the prior award following three additional heart attacks, where the Commission found that he had been permanently and totally disabled since June, 1981, partially as a result of his compensable heart attack in 1979. Weaver v. Swedish Imports Maintenance, Inc., 80 N.C. App. 432, 343 S.E.2d 205 (1986).

III. TIME LIMITATIONS.

The time limitation is not jurisdictional, etc. —

In accord with 2nd paragraph in the main volume. See Cook v. Southern Bonded, Inc., 82 N.C. App. 277, 346 S.E.2d 168 (1986), cert. denied, 318 N.C. 692, 351 S.E.2d 741 (1987).

But Is a Technical Legal Defense. The two-year time limitation in this section is a statute of limitations, a technical legal defense which may be asserted by the employer. Hand ex rel. Hand v. Fieldcrest Mills, Inc., — N.C. App. —, 355 S.E.2d 141 (1987).

When Time for Filing Claim for Change of Condition Begins to Run. — For purposes of this section, the statutory one-year period for filing a claim for a change of condition begins at the time final payment is accepted, not when I.C. Form 28B is filed. Nonetheless, the Commission must be given the opportunity to determine whether a payment labeled "final" is or should be, in fact, the final payment. After this determination is made, the Commission accepts and approves a copy of Form 28B. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, cert. granted as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

When Time Limitation Begins to Run. — Under this section, the time limitation commences to run from the date on which employee received the last payment of compensation, not from the date on which he received a Form 28B. Cook v. Southern Bonded, Inc., 82 N.C. App. 277, 346 S.E.2d 168 (1986), cert. denied, 318 N.C. 692, 351 S.E.2d 741 (1987).

The time limitation of this section does not commence to run upon the dismissal of an appeal. Cook v. Southern Bonded, Inc., 82 N.C. App. 277, 346 S.E.2d 168 (1986), cert. denied, 318 N.C. 692, 351 S.E.2d 741 (1987).

Two-year time limit of this section begins to run upon receipt and acceptance of the last compensation check, not when the injury constituting a change of condition is first diagnosed. Hand ex rel. Hand v. Fieldcrest Mills, Inc., — N.C. App. —, 355 S.E.2d 141 (1987).

Estoppel to Rely on Delay. —

In accord with 1st paragraph in main volume. See Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

Effect of Plaintiff's Signature, etc.—

The execution, filing and forwarding to plaintiff of I.C. Form 28B, which by its terms gave notice to plaintiff that his case was closed and that he had one year (now two years) in which to notify the Commission, in writing, that he claimed further benefits, in fact closed plaintiff's case and terminated his claim for injuries arising out of his accident. Plaintiff's signature was not a necessary element for the proper execution of the form. Chisholm v. Diamond Condominium Constr. Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986).

Date of Last Payment. —

The last payment of compensation within the meaning of this section is the date the last check was delivered to and accepted by the employee. Cook v. Southern Bonded, Inc., 82 N.C. App. 277, 346 S.E.2d 168 (1986), cert. denied, 318 N.C. 692, 351 S.E.2d 741 (1987).

Employee May Seek Review of Award Before Last Payment. — This section allows an employee to effectively apply for a review of his award before the date of the last payment of compensation from the award. Apple v. Guilford County, — N.C. App. —, 353 S.E.2d 641 (1987).

Additional Notice of Accident as Sufficient Notice of Claim to Further Benefits. — Plaintiff's act of filing an additional notice of accident, I.C. Form 18, claiming that he was still experiencing impairments in his lower back and right leg as a result of his accident, while not specifically alleging any change in condition or any permanent injuries, was sufficient to give the Commission the requisite written notice of plaintiff's claim to further benefits. Chisholm v. Diamond Condominium Constr. Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986).

Filing of Notice Held Valid Application for Review of Award. — The filing of an Industrial Commission Form 18 ("Notice of Accident to Employer and Claim of Employee . . .") is sufficient to constitute an application for the Commission to review an award pursuant to this section. This is true even if it fails to specifically allege any change in condition or any permanent injury. Therefore, plaintiff's filing of an Industrial Commission Form 18 was a valid application for review of her award based on a change in condition. Because the two-year limitation does not run against a claim which has already been filed, plaintiff's claim for review was not barred. Apple v. Guilford County, — N.C. App. —, 353 S.E.2d 641 (1987).

Form 28B Held Without Effect on Previously Filed Application for Review. — While an Industrial Commission Form 28B ("Report of Compensation of Disability"), when sent together with the employee's last compensation payment, ordinarily closes the employee's case, it has no effect on an application for review which has previously been filed with the Commission. Apple v. Guilford County, — N.C. App. —, 353 S.E.2d 641 (1987).

§ 97-48. Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer.

CASE NOTES

Cited in Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

§ 97-50. Limitation as against minors or mentally incompetent.

CASE NOTES

Evidence Supported Commission's Finding of Competency. — Where there was evidence which would support a finding that plaintiff was incompetent during the relevant period, but there was also evidence which supported the commission's finding of fact that plaintiff was not incompetent, including evidence that plaintiff performed her job, which required physical and mental dexterity, in a satisfactory manner, understood her pay scale and contested the amount when she thought it was too low, the commission's finding was conclusive. Hand ex rel. Hand v. Fieldcrest Mills, Inc., — N.C. App. —, 355 S.E.2d 141 (1987).

§ 97-52. Occupational disease made compensable; "accident" defined.

Legal Periodicals. —

For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

CASE NOTES

Editor's Note. — *For additional cases regarding compensability of occupational disease, see the case notes under § 97-53.*

Purpose, etc. —

The purpose of this section and § 97-53 was to compensate employees for occupational disease as defined in the Act. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

The purpose of this section is to enable a worker to recover for disability caused by occupational disease under § 97-29. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Words "disablement or death" in this section merely describe a condition that must occur before recovery may be had under § 97-29. They do not predicate recovery under § 97-31 upon disability. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Limitation on meaning of "accident" simply prevents claims for maladies that are neither occupational in nature nor arise from an event definite in time and place. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Other Gradually Developing Conditions Not Compensable. — This section precludes claims for conditions that develop gradually but do not fall into the category of occupational disease. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Disability Need Not Be Shown to Recover under § 97-31. — The obvious intent of the Legislature in enacting this section was to permit and not restrict recovery for occupational diseases. This section, therefore, does not require that disability be shown as a condition to recovery under the schedule for occupational disease in § 97-31. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Showing that Activity Did Not previously Cause Pain Insufficient. — It is insufficient as a matter of law to show only that in the past a regular activity caused no pain and that the same activity now causes pain; there must be a specific fortuitous event, rather than a gradual build-up of pain, in order to show injury by accident. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Employee's suicide caused by occupational disease is compensable under the Workers' Compensation Act. This is so because this section makes it clear that the death of an employee resulting from an occupational disease shall be treated as the happening of an injury by accident. Harvey v. Raleigh

Police Dep't, — N.C. App. —, 355 S.E.2d 147 (1987).

Remand for Findings as to Capacity for Other Employment. — Where the Commission found that plaintiff had chronic obstructive pulmonary disease caused in part by her exposure to respirable cotton dust during her employment, but that her impairment was not sufficient to render plaintiff incapable of performing types of employment which did not require very strenuous activity or exposure to cotton dust, but the Commission's findings did not address evidence that due to plaintiff's education, age and experience she was probably not capable of earning wages in any employment which did not require substantial physical exertion, the case would be remanded for appropriate findings and conclusions of plaintiff's capacity to earn wages in employment for which she might be qualified. Webb v. Pauline Knitting Indus., 78 N.C. App. 184, 336 S.E.2d 645 (1985).

Effect of Retirement. — Because disability measures an employee's present ability to earn wages, and is unrelated to a decision to withdraw from the labor force by retirement, the Commission may not deny disability benefits because the claimant retired, where there is evidence of diminished earning capacity caused by an occupational disease. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Report under § 97-92(a). — Section 97-92(a) requires an employer to report any injury by accident if it keeps the employee from work for more than one day. Presumably this would include notice of an occupational disease which is considered an injury by accident. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Applied in Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Stated in Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.

The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:

(1) Anthrax.
(2) Arsenic poisoning.
(3) Brass poisoning.
(4) Zinc poisoning.
(5) Manganese poisoning.
(6) Lead poisoning. Provided the employee shall have been exposed to the hazard of lead poisoning for at least 30 days in the preceding 12 months' period; and, provided further, only the employer in whose employment such employee was last injuriously exposed shall be liable.
(7) Mercury poisoning.
(8) Phosphorus poisoning.
(9) Poisoning by carbon bisulphide, menthanol, naphtha or volatile halogenated hydrocarbons.
(10) Chrome ulceration.
(11) Compressed-air illness.
(12) Poisoning by benzol, or by nitro and amido derivatives of benzol (dinitrolbenzol, anilin, and others).
(13) Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.
(14) Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to tar, pitch, bitumen, min-

eral oil, or paraffin, or any compound, product, or residue of any of these substances.

(15) Radium poisoning or disability or death due to radioactive properties of substances or to roentgen rays, X rays or exposure to any other source of radiation; provided, however, that the disease under this subdivision shall be deemed to have occurred on the date that disability or death shall occur by reason of such disease.

(16) Blisters due to use of tools or appliances in the employment.

(17) Bursitis due to intermittent pressure in the employment.

(18) Miner's nystagmus.

(19) Bone felon due to constant or intermittent pressure in employment.

(20) Synovitis, caused by trauma in employment.

(21) Tenosynovitis, caused by trauma in employment.

(22) Carbon monoxide poisoning.

(23) Poisoning by sulphuric, hydrochloric or hydrofluoric acid.

(24) Asbestosis.

(25) Silicosis.

(26) Psittacosis.

(27) Undulant fever.

(28) Loss of hearing caused by harmful noise in the employment. The following rules shall be applicable in determining eligibility for compensation and the period during which compensation shall be payable:

a. The term "harmful noise" means sound in employment capable of producing occupational loss of hearing as hereinafter defined. Sound of an intensity of less than 90 decibels, A scale, shall be deemed incapable of producing occupational loss of hearing as defined in this section.

b. "Occupational loss of hearing" shall mean a permanent sensorineural loss of hearing in both ears caused by prolonged exposure to harmful noise in employment. Except in instances of preexisting loss of hearing due to disease, trauma, or congenital deafness in one ear, no compensation shall be payable under this subdivision unless prolonged exposure to harmful noise in employment has caused loss of hearing in both ears as hereinafter provided.

c. No compensation benefits shall be payable for temporary total or temporary partial disability under this subdivision and there shall be no award for tinnitus or a psychogenic hearing loss.

d. An employer shall become liable for the entire occupational hearing loss to which his employment has contributed, but if previous deafness is established by a hearing test or other competent evidence, whether or not the employee was exposed to harmful noise within six months preceding such test, the employer shall not be liable for previous loss so established, nor shall he be liable for any loss for which compensation has previously been paid or awarded and the employer shall be liable only for the difference between the percent of occupational hearing loss determined as of the date of

disability as herein defined and the percentage of loss established by the preemployment and audiometric examination excluding, in any event, hearing losses arising from nonoccupational causes.

e. In the evaluation of occupational hearing loss, only the hearing levels at the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second shall be considered. Hearing losses for frequencies below 500 and above 3,000 cycles per second are not to be considered as constituting compensable hearing disability.

f. The employer liable for the compensation in this section shall be the employer in whose employment the employee was last exposed to harmful noise in North Carolina during a period of 90 working days or parts thereof, and an exposure during a period of less than 90 working days or parts thereof shall be held not to be an injurious exposure; provided, however, that in the event an insurance carrier has been on the risk for a period of time during which an employee has been injuriously exposed to harmful noise, and if after insurance carrier goes off the risk said employee has been further exposed to harmful noise, although not exposed for 90 working days or parts thereof so as to constitute an injurious exposure, such carrier shall, nevertheless, be liable.

g. The percentage of hearing loss shall be calculated as the average, in decibels, of the thresholds of hearing for the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second. Pure tone air conduction audiometric instruments, properly calibrated according to accepted national standards such as American Standards Association, Inc., (ASA), International Standards Organization (ISO), or American National Standards Institute, Inc., (ANSI), shall be used for measuring hearing loss. If more than one audiogram is taken, the audiogram having the lowest threshold will be used to calculate occupational hearing loss. If the losses of hearing average 15 decibels (26 db if ANSI or ISO) or less in the three frequencies, such losses of hearing shall not constitute any compensable hearing disability. If the losses of hearing average 82 decibels (93 db if ANSI or ISO) or more in the three frequencies, then the same shall constitute and be total or one hundred percent (100%) compensable hearing loss. In measuring hearing impairment, the lowest measured losses in each of the three frequencies shall be added together and divided by three to determine the average decibel loss. For each decibel of loss exceeding 15 decibels (26 db if ANSI or ISO) an allowance of one and one-half percent (1½%) shall be made up to the maximum of one hundred percent (100%) which is reached at 82 decibels (93 db if ANSI or ISO). In determining the binaural percentage of loss, the percentage of impairment in the better ear shall be multiplied by five. The resulting figure shall be added to the percentage of impairment in the poorer ear, and the sum of the two

divided by six. The final percentage shall represent the binaural hearing impairment.

h. There shall be payable for total occupational loss of hearing in both ears 150 weeks of compensation, and for partial occupational loss of hearing in both ears such proportion of these periods of payment as such partial loss bears to total loss.

i. No claim for compensation for occupational hearing loss shall be filed until after six months have elapsed since exposure to harmful noise with the last employer. The last day of such exposure shall be the date of disability. The regular use of employer-provided protective devices capable of preventing loss of hearing from the particular harmful noise where the employee works shall constitute removal from exposure to such particular harmful noise.

j. No consideration shall be given to the question of whether or not the ability of an employee to understand speech is improved by the use of a hearing aid. The North Carolina Industrial Commission may order the employer to provide the employee with an original hearing aid if it will materially improve the employee's ability to hear.

k. No compensation benefits shall be payable for the loss of hearing caused by harmful noise after October 1, 1971, if employee fails to regularly utilize employer-provided protection device or devices, capable of preventing loss of hearing from the particular harmful noise where the employee works.

Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals. (1935, c. 123; 1949, c. 1078; 1953, c. 1112; 1955, c. 1026, s. 10; 1957, c. 1396, s. 6; 1963, c. 553, s. 1; c. 965; 1971, c. 547, s. 1; c. 1108, s. 1; 1973, c. 760, ss. 1, 2; 1975, c. 718, s. 4; 1987, c. 729, ss. 11, 12.)

Effect of Amendments. — The 1987 amendment, effective August 5, 1987, substituted "2,000, and 3,000" for "and 2,000" in the first sentence of paragraph (28)e, substituted "3,000" for "2,000" in the second sentence of paragraph (28)e, and substituted "500, 1,000, 2,000, and 3,000" for "500, 1,000 and 2,000" in the first sentence of paragraph (28)g.

Legal Periodicals. —

For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

CASE NOTES

I. IN GENERAL.

Editor's Note. — *For additional cases regarding compensability of occupational disease, see the case notes under § 97-52.*

Legislative Intent. —

The purpose of § 97-52 and this section was to compensate employees for occupational disease as defined in the Act. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Or Aggravated or Accelerated, etc. —

Disability caused by, or death resulting from, a disease is compensable only

when the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to the claimant's employment. Goodman v. Cone Mills Corp., 75 N.C. App. 493, 331 S.E.2d 261 (1985).

Cited in Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986); Joyner v. Rocky Mount Mills, — N.C. App. —, 355 S.E.2d 161 (1987).

II. SUBDIVISION (13).

The 1971 amendment to subdivision (13) of this section broadened its coverage to include a wider range of conditions susceptible to interpretation of being occupational diseases within the meaning of the act. Carawan v. Carolina Tel. & Tel. Co., 79 N.C. App. 703, 340 S.E.2d 506 (1986).

Applicability of Amended, etc. — The 1971 amendment of subdivision (13) of this section to its present form, which defines occupational disease, applies to all cases originating on and after July 1, 1971. Unlike the 1963 amendment, it was not limited to cases in which the "last exposure" to disease occurred after its effective date, but to cases "originating" after such date. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The current (1971) version of subdivision (13) of this section applies to all claims for disablement in which the disability occurs after the statute's effective date, July 1, 1971. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The 1963 amendment of subdivision (13) of this section to include infections or inflammations of "any other internal or external organ or organs of the body" applied only to cases in which the last exposure in an occupation subject to the hazards of such disease occurred on or after July 1, 1963. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

What Constitutes Occupational Disease. — Under subdivision (13) of this section, any disease is an occupational disease if it is due to causes and conditions peculiarly characteristic of the worker's particular trade, occupation or employment, and if the disease is not one that the general public, outside of the particular employment, stands an equal risk of contracting. The statute contains no other conditions and excludes no particular diseases, including the ordinary diseases of life. Thomason v. Fiber Indus., 78 N.C. App. 159, 336 S.E.2d 632 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 573 (1986).

A disease is an occupational disease compensable under this section if claimant's employment exposed him to a greater risk of contracting this disease than members of the public generally and such exposure significantly contributed to, or was a significant causal factor in, the disease's development. Perry v. Burlington Indus., Inc., 80 N.C. App. 650, 343 S.E.2d 215 (1986).

To prove the existence, etc. — In accord with the main volume. See Perry v. Burlington Indus., Inc., 80 N.C. App. 650, 343 S.E.2d 215 (1986).

But Employment Need Not Be Exclusive Cause, etc. — Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 101, 301 S.E.2d 359 (1983), expressly replaced the former standard of actual causation with a liberalized standard of causation, whereby exposure to cotton dust need only be a significant causative or contributing factor in the disease's development. Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

Fact that on cross-examination physician testified that plaintiff's cigarette smoking was probably a more significant contributing factor than his occupation did not compel the conclusion that plaintiff did not have a compensable occupational disease. So long as the employment significantly contributed to, or was a significant causal factor in, the disease's development, an occupational disease is compensable under this section. Perry v. Burlington Indus., Inc., 80 N.C. App. 650, 343 S.E.2d 215 (1986).

Factual inquiry should be whether occupational exposure was such significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work. Rutledge v. Tultex Corp., 308 N.C. 85, 301 S.E.2d 359 (1983); Collins v. Mills, — N.C. App. —, 354 S.E.2d 245 (1987).

Causal Connection May Be Established by Circumstantial Evidence. — In occupational disease cases, the causal connection between the disease and the employee's occupation must of necessity be based upon circumstantial evidence. Lumley v. Dancy Constr. Co., 79 N.C. App. 114, 339 S.E.2d 9 (1986).

Commission Must Determine Significance of Exposure. — Ultimately, the Commission must determine whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work. Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986); Perry v. Burlington Indus., Inc., 80 N.C. App. 650, 343 S.E.2d 215 (1986).

Factors in Determining Significance of Exposure. — In determining the role occupational exposure played in development of disease, the Commission may consider, in addition to expert medical testimony, factual circumstances which bear on the question of causation. Thus, the Commission may consider (1) the nature and extent of claimant's occupational exposure, (2) the presence or absence of other nonwork-related exposures and components which contributed to the disease's development, and (3) correlations between claimant's work history and the development of the disease. Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986).

Causal Relationship Between Disease and Inability to Work. — Evidence that a claimant's environmental restriction (caused by an occupational disease) significantly limits the scope of potential employment in his or her usual vocation, when combined with other factors such as a lack of training in any other vocation, is competent to establish a causal nexus between the occupational disease and the partial or total inability to earn wages in the same or any other employment. Preslar v. Cannon Mills Co., 80 N.C. App. 610, 343 S.E.2d 209 (1986).

The right to compensation, etc. —

In accord with main volume. See Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986).

Award Where Occupational and Nonoccupational Disease Cannot Be Apportioned. — Where medical evidence would not permit any reasonable apportionment of claimant's disability between occupational and nonoccupational disease, claimant would be entitled to an award for her entire disability if her occupational disease was a substantial and material factor in bringing about that disability. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985), remanding to the Commission for a determination of the issue.

Claimant Has Burden, etc. —

The claimant carries the burden of proving the existence of a compensable claim. Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986).

Individual who retired from job in which he had 47 years of experience at age 70, and subsequently attempted to return to work but could not obtain comparable employment, was entitled to partial disability compensation based on the difference between his present and former wages, in view of environmental restriction, caused by his occupational disease (COPD), which combined with other factors to limit the scope of his potential employment. Preslar v. Cannon Mills Co., 80 N.C. App. 610, 343 S.E.2d 209 (1986).

III. PARTICULAR DISEASES.

Byssinosis. —

Evidence held sufficient to support the finding that plaintiff was partially incapable of engaging in gainful employment by byssinosis and chronic obstructive lung disease as a result of 29 years of smoking and exposure to cotton dust, and that his occupational disease, combined with his age, limited education and work experience, limited his ability to earn wages. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Chronic Obstructive Pulmonary Disease.—

In accord with 2nd paragraph in main volume. See McHargue v. Burlington Indus., 78 N.C. App. 324, 337 S.E.2d 584 (1985); Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

Chronic obstructive lung disease may be an occupational disease provided that the worker's exposure to substances peculiar to the occupation in question significantly contributed to, or was a significant causal factor in, the development of the disease. Goodman v. Cone Mills Corp., 75 N.C. App. 493, 331 S.E.2d 261 (1985).

In determining whether exposure to an occupational substance significantly contributed to, or was a significant causal factor in, chronic obstructive lung disease, the Commission may consider medical testimony as well as other factual circumstances in the case, including the extent of the worker's exposure to the substance, the extent of non-occupational but contributing factors, and the

manner of development of the disease as it relates to the claimant's work history. Goodman v. Cone Mills Corp., 75 N.C. App. 493, 331 S.E.2d 261 (1985).

Where a medical doctor, a specialist in pulmonary medicine, testified, and the Commission found, that the claimant's chronic obstructive lung disease was not caused, in whole or in part, by exposure to an occupational substance (i.e., cotton dust), but was due instead, to cigarette smoking, upon such a finding, the Commission was required to conclude that the claimant's disease was not an occupational disease. Goodman v. Cone Mills Corp., 75 N.C. App. 493, 331 S.E.2d 261 (1985).

Doctor's testimony that the sulfuric acid fumes inhaled by plaintiff in his employment as a "battery buster" were a respiratory irritant, along with testimony that plaintiff often inhaled those fumes, was sufficient to establish a causal relationship with plaintiff's obstructive lung disease. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

Employee in his late fifties whose formal education ended after the first grade, and who could not read, write or sign his name; did not know his date of birth; had a long history of cigarette smoking; worked on and off in the textile industry until March, 1981; and had chronic obstructive pulmonary disease, was not entitled to benefits, as he failed to prove extent of exposure to cotton dust and causation. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Chronic obstructive pulmonary disease may be an occupational disease if (i) the occupation in question exposed the worker to a greater risk of contracting the disease than that faced by members of the public generally and (ii) the worker's exposure to cotton dust significantly contributed to or was a significant causal factor in the disease's development, even if other non-work-related factors also make significant contributions, or were significant causal factors. Rutledge v. Tultex Corp., 308 N.C. 85, 301 S.E.2d 359 (1983); Collins v. Mills, — N.C. App. —, 354 S.E.2d 245 (1987).

Testimony of physician that considering plaintiff's history of cigarette smoking, his ability to perform work today would be the same had plaintiff worked on a farm rather than in the textile industry, supported the commission's conclusion that plaintiff's exposure to cotton dust was not a significant factor in the cause of plaintiff's chronic obstructive lung disease. Collins v. Mills, — N.C. App. —, 354 S.E.2d 245 (1987).

When Byssinosis and Chronic Obstructive Pulmonary Disease Are "Occupational" under Subdivision (13). — Byssinosis and chronic obstructive pulmonary disease are not among the prima facie occupational diseases listed in this section. Therefore, to be "occupational" under the catch-all provision of subdivision (13), the plaintiff's disease must be characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged, and not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation, and there must be a causal connection between the disease and the claimant's employment. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Obstruction caused by chronic obstructive lung disease need not be apportioned between occupational and nonoccupational causes; a claimant may recover the entire disability resulting from such obstruction, so long as the occupation-related cause was a significant causal factor in the disease's development. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Progression of chronic obstructive lung disease is not the test of compensability; rather, the test is whether the occupational exposure significantly contributed to the disabling disease's development. Neal v. Leslie Fay, Inc., 78 N.C. App. 117, 336 S.E.2d 628 (1985).

Chronic Bronchitis Caused by Pneumonia. — Finding of the Commission that employee who worked in the cotton textile industry had chronic bronchitis caused by nonwork-related pneumonia would be upheld. Clark v. American & Efird Mills, 82 N.C. App. 192, 346 S.E.2d 155, petition for review denied, 318 N.C. 413, 349 S.E.2d 591 (1986).

Lung Disease Partially Caused by Occupational Exposure. — In determining chronic obstructive lung disabilities which are caused in part by occupational exposure to cotton dust and in part by some other cause or causes unrelated to the employment, the following rule applies: When exposure to cotton dust is an insignificant causal factor in, or does not significantly contribute to,

the development of the disabling lung disease, it is not an occupational disease within the purview of subdivision (13) of this section and no compensation is due therefor; but when the exposure to cotton dust significantly contributes to, or is a significant causal factor in, the development of a disabling lung disease it is an occupational disease and compensation for the full extent of the disability is due. Neal v. Leslie Fay, Inc., 78 N.C. App. 117, 336 S.E.2d 628 (1985).

Findings as to Cause of Lung Disease. — It was not enough for the Commission to say that claimant's lung disease was "not caused by" exposure to cotton dust in her employment, where the Commission did not, however, make any findings on the issue of "significant contribution." McHargue v. Burlington Indus., 78 N.C. App. 324, 337 S.E.2d 584 (1985).

Costochondritis. — Evidence tending to show that the disabling inflammation of the cartilaginous tissues between plaintiff's sternum and ribs was caused by her constant lifting of 50 pound cakes of yarn, as her employment required; that the causes and conditions of her inflammation were peculiarly characteristic of her employment; and that her work placed her at a greater risk of contracting the inflammatory disease process than the public at large, few of whom regularly and repeatedly lift anything weighing 50 pounds, was support enough for the Commission's conclusion that plaintiff's disabling costochondritis was an occupational disease under subdivision (13). Thomason v. Fiber Indus., 78 N.C. App. 159, 336 S.E.2d 632 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 573 (1986).

Pesticide Allergy. — Although chlorpyrifos (Dursban), to which plaintiff was allergic, is not listed in this section, the evidence permitted the Commission to find and conclude that the form and quantity of her exposure to chlorpyrifos, due to repeated treatment of the workplace by the employer, caused her to contract a compensable occupational disease. Carawan v. Carolina Tel. & Tel. Co., 79 N.C. App. 703, 340 S.E.2d 506 (1986).

Scarring of Ulnar Arteries. — Evidence held to support the Commission's finding that adventitial scarring of the ulnar arteries was peculiar to the occupation of carpenter's helper, which trade involves repetitive trauma to the palm area of the hand. Lumley v. Dancy Constr. Co., 79 N.C. App. 114, 339 S.E.2d 9 (1986).

Suicide. — Commission's finding that police officer's death by suicide was not due to a compensable disease within the meaning of subdivision (13) was not supported by findings of fact where the commission failed to determine whether he had a dysthymic disorder (depression) as testified to by expert, and made no findings adequate to support a conclusion that if he had a dysthymic disorder, it was not an occupational disease. Harvey v. Raleigh Police Dep't, — N.C. App. —, 355 S.E.2d 147 (1987).

IV. HEARING LOSS.

Compensability of Hearing Loss Existing Prior to October 1, 1971. — Nothing in Session Laws 1971, c. 1108, s. 3, which added subdivision (28) of this section, or in subdivision (28) itself, expressly mandates that hearing loss existing prior to October 1, 1971, is not compensable, as long as the last injurious exposure occurred after that date. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

If plaintiff, who suffered an occupational hearing loss while employed with defendant, could show any augmentation of his condition, however slight, proximately resulting from his employment with defendant and occurring after October 1, 1971, then defendant could properly and constitutionally be liable for the entire disability. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Augmentation of Hearing Loss after October 1, 1971. — Defendant employer may be held liable for plaintiff's entire disability if plaintiff could show any augmentation of his occupational hearing loss, however slight, proximately resulting from his employment with defendant and occurring after October 1, 1971. Preslar v. Cannon Mills Co., 81 N.C. App. 276, 344 S.E.2d 141 (1986).

The Commission erred in awarding plaintiff compensation for the 10% difference between his hearing loss established in 1984 and his hearing loss established prior to October 1, 1971, the effective date of subdivision (28) of this section, rather than awarding him compensation for the entire occupational hearing loss of 48.5% to which his employment contributed. Preslar v. Can-

non Mills Co., 81 N.C. App. 276, 344 S.E.2d 141 (1986).

The 90 decibel limit in this section is the ambient noise level. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Effect of Regular Use of Protective Devices. — The last sentence of paragraph (28)i of this section means that regular use of protective devices constitutes removal from exposure only for purposes of triggering the statutory six-month waiting period established by the first sentence of paragraph (28)i. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

The providing of protective devices does not establish any absolute bar to claims for hearing loss, and the Commission erred in so interpreting paragraph (28)i of this section. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Noise to Be Measured in Workplace and Not inside Protective Device. — North Carolina industrial noise monitoring requirements require noise to be measured in the workplace. Contentions that compliance with the 90 decibel standard should be measured inside the hearing protective device worn by the employee, rather than in the workplace itself, have been rejected. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

§ 97-54. "Disablement" defined.

CASE NOTES

When Plaintiff First Learned of Disease Irrelevant to When Disability Began. — Plaintiff did not become disabled within the meaning of the Workers' Compensation Act until June 3, 1982, when he was forced to stop work of any kind because of his occupational disease. Because plaintiff was able to earn the wages he had always received until that date, the arguments as to when plaintiff was first informed of the nature and work-related cause of his disease were irrelevant. Thus his claim, filed on February 2, 1983, was timely. Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 583 (1986).

Evidence of Disability from Byssinosis and Chronic Obstructive Lung Disease. — Evidence held sufficient to support the finding that plaintiff was partially incapable of engaging in gainful employment by byssinosis and chronic obstructive lung disease as a result of 29 years of smoking and exposure to cotton dust, and that his occupational disease, combined with his age, limited education and work experience, limited his ability to earn wages. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Claimant Unable to Earn Wages in Any Job for Which Qualified Is Totally, Not Partially, Disabled. — The Commission erred as a matter of law by awarding claimant compensation for partial disability when it found as fact that plaintiff was incapable of earning wages in any employment for which plaintiff was qualified. Based on the Commission's findings, plaintiff was totally disabled within the meaning of § 97-29. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Where a plaintiff, due to an occupational disease, is fully incapacitated to earn wages at employment which is the only work he is qualified to do by reason of such factors as age and education, he is totally incapacitated. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Stated in Peoples v. Cone Mills Corp., 316 N.C. 424, 342 S.E.2d 798 (1986).

§ 97-57. Employer liable.

Legal Periodicals. —

For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

CASE NOTES

The purpose of this section is to determine whether there has been sufficient exposure to the hazards of asbestosis during a particular period of employment to hold the employer during that period liable. By contrast, the purpose of 97-58(a) is to limit the time in which an employer is liable for a compensable exposure. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

"Hazard". — The term "hazard" should be given its common and ordinary meaning, since there is nothing to indicate that the legislature intended it to have some other meaning and it has not acquired some technical meaning. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

By the phrase "hazards of the disease," as used in this section, the legislature intended to include more than substances which are capable in themselves of producing an occupational disease. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

In order for a substance to be a "hazard" of an occupational disease within the meaning of this section, it must be a substance peculiar to the workplace. By this it is meant that the substance is one to which the worker has a greater exposure on the job than does the public generally, either because of the nature of the substance itself or because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

A condition peculiar to the workplace which accelerates the progress of an occupational disease to such an extent that the disease finally causes the worker's incapacity to work constitutes a source of danger and difficulty to that worker and increases the possibility of that worker's ultimate loss. It constitutes, therefore, a hazard of the disease as the term "hazard" is commonly used. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

Dust as Substance Peculiar to Workplace. — Dust arising from the processing of synthetic fibers in textile plants is a substance to which, because of its nature, workers in those plants have a greater exposure than does the public generally. It is, therefore, a substance peculiar to the workplace. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

Liability of Employer in Whose Employment Employee Was Last Injuriously Exposed. — In compensable cases of occupational diseases, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease is liable. This section does not require an independent showing of a significant contribution to the occupational disease. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

Last Injurious Exposure Can Be Quantitatively Slight. — Exposure to a substance which can cause an occupational disease can be a last injurious exposure to the hazards of such disease under this section even if the exposure in question is so slight quantitatively that it could not in itself have produced the disease. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

If the occupational exposure in question is such that it augments the disease process to any degree, however slight, the employer is liable. Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986).

"Last injuriously exposed" means an exposure which proximately augmented the disease to any extent, however slight. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

Substance Need Not Be Known to Cause Disease. — In addition, the substance to which plaintiff was last injuriously exposed need not be a substance known to cause the disease. Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986).

Finding of Last Injurious Exposure Held Not Inconsistent with

Other Findings. — Where an employee's exposure to dust at his last employer's plants, including the last plant at which he worked, contributed to his pulmonary symptoms and was harmful to him, and his last injurious exposure to the hazards of his lung disease occurred while he was employed by his last employer, the Commission's finding that dust from the synthetic fibers present at his last employer's plants was not known to cause chronic obstructive lung disease did not preclude a conclusion that exposure to it constituted a last injurious exposure to the hazards of the disease. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

In chronic obstructive lung disease cases, the last injurious exposure to "the hazards of such disease" is not necessarily limited to cotton dust; it can be to other conditions that enhance or augment the disease process and the worker's condition to any extent. Neal v. Leslie Fay, Inc., 78 N.C. App. 117, 336 S.E.2d 628 (1985).

It is not necessary that the last injurious exposure to the hazards of chronic obstructive lung disease either caused or significantly contributed to the occupational disease; it is enough if the exposure augmented the disease to any extent whatever. Neal v. Leslie Fay, Inc., 78 N.C. App. 117, 336 S.E.2d 628 (1985).

Application of definition of "injurious exposure" in the first clause of the second paragraph of this section to the hazards of asbestosis is limited, by the express language of the statute, to determining liability under this section. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

Exposure Requirement of this Section Not Read into § 97-58(a). — Logically there is no reason to read the exposure requirements of this section into § 97-58(a), and the Court of Appeals would decline to do so. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

Findings Required to Support Award, etc. —

In accord with main volume. See Woodell v. Starr Davis Co., 77 N.C. App. 352, 335 S.E.2d 48 (1985).

§ 97-58. Time limit for filing claims.

(a) Repealed by Session Laws 1987, c. 729, s. 13, effective August 5, 1987.

(b) The report and notice to the employer as required by G.S. 97-22 shall apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

(c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be. Provided, however, that the right to compensation for radiation injury, disability or death shall be barred unless a claim is filed within two years after the date upon which the employee first suffered incapacity from the exposure to radiation and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by his present or prior employment. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 6; 1963, c. 553, s. 2; 1973, c. 1060, s. 3; 1981, c. 734, s. 1; 1987, c. 729, s. 13.)

Effect of Amendments. — The 1987 amendment, effective August 5, 1987, deleted subsection (a), which formerly read "Except as otherwise provided in G.S. 97-61.6, an employer shall not be liable for any compensation for asbestosis unless disablement or death results within 10 years after the last exposure to that disease, or, in case of death, unless death follows continuous disablement from such disease, commencing within the period of 10 years limited herein, and for which compensation has been paid or awarded or timely claim made. An employer shall not be liable for any compensation for lead poisoning unless disablement or death results within two years after the last exposure to that disease, or, in case of death, unless death follows continuous disable-

ment from such disease, commencing within the period of two years limited herein, and for which compensation has been paid or awarded or timely claim made." In addition, the amendment deleted "Claims for certain diseases restricted" at the beginning of the catchline.

Legal Periodicals. —

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

CASE NOTES

I. IN GENERAL.

Editor's Note. — The cases below and under this section in the main volume were decided prior to the 1987 amendment deleting subsection (a), which had set certain restrictions on claims relating to asbestosis and lead poisoning.

Subsections (b) and (c) must be construed in pari materia. Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 583 (1986).

Failure to obtain approval for payments of medical expenses does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832 (1986).

Cited in C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985); Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985); Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

II. ASBESTOSIS, SILICOSIS AND LEAD POISONING.

Editor's Note. — The cases under this analysis line in the main volume were decided prior to the 1987 amendment deleting subsection (a), which had set certain restrictions on claims relating to asbestosis and lead poisoning.

Applicability of 1981 Amendment to Subsection (a). — The Commission erred in failing to apply the provisions of subsection (a) of this section, as amended effective July 1, 1981, where plaintiff's decedent died on December 11, 1981, and plaintiff's claim was filed on January 8, 1982. As the amended version of subsection (a) was in effect at the time plaintiff's right to compensation arose, viz., the time of decedent's death, the amended version could constitutionally apply to plaintiff's claim. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

Purpose of § 97-57 and Subsection (a) of this Section Compared. — The purpose of § 97-57 is to determine whether there has been sufficient exposure to the hazards of asbestosis during a particular period of employment to hold the employer during that period liable. By contrast, the purpose of subsection (a) of this section is to limit the time in which an employer is liable for a compensable exposure. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

Exposure Requirement of § 97-57 Not Read into Subsection (a) of this Section. — Logically there is no reason to read the exposure requirements of § 97-57 into subsection (a) of this section, and the Court of Appeals would decline to do so. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

III. REPORT AND NOTICE.

Employer's failure to notify the Commission pursuant to subdivision (a) of § 97-92 does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

IV. FILING OF CLAIMS.

The two-year time limit, etc. —

Two year statute of limitation is a condition precedent with which a plaintiff must comply in order to confer jurisdiction on the Industrial Commission. Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 583 (1986).

When Two-Year Limit Begins, etc. — The two year period within which claims for benefits for an occupational disease must be filed begins running when an employee has suffered injury from an occupational disease which ren-

ders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and the employee is informed by competent medical authority of the nature and work-related cause of the disease. Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 583 (1986).

Though the two-year time limit for timely filing is a jurisdictional requisite, without which the Commission may not consider a workers' compensation claim, the time does not begin to run against occupational disease claims until the employee is informed by competent medical authority of the nature and work-related cause of the disease. McCubbins v. Fieldcrest Mills, Inc., 79 N.C. App. 409, 339 S.E.2d 497, cert. denied, 316 N.C. 732, 345 S.E.2d 389 (1986).

V. KNOWLEDGE OF EMPLOYEE.

When Plaintiff First Learned of Disease Irrelevant to When Disability Began. — Plaintiff did not become disabled within the meaning of the Workers' Compensation Act until June 3, 1982, when he was forced to stop work of any kind because of his occupational disease. Because plaintiff was able to earn the wages he had always received until that date, the arguments as to when plaintiff was first informed of the nature and work-related cause of his disease were irrelevant. Thus his claim, filed on February 2, 1983, was timely. Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 583 (1986).

§ 97-59. Employer to pay for treatment.

CASE NOTES

"Needed Relief". — There is nothing talismanic about the phrase "needed relief." Where a medical expert's testimony is otherwise clear, he is not required to use those particular words to justify an award for future medical expenses. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Failure to obtain approval for payments of medical expenses does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Plaintiff failed to properly preserve his right to appeal the failure of the Deputy Commissioner to order payment of medical expenses under this section, where there was no evidence in the record that the matter was ever addressed by the full commission, the plaintiff did not appeal from the Deputy Commissioner's opinion and award, and the sole issue on appeal before the full commission was the propriety of the amounts awarded for loss of lung function and attorney fees. Joyner v. Rocky Mount Mills, — N.C. App. —, 355 S.E.2d 161 (1987).

Applied in Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Stated in Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

§ 97-61.6. Hearing after third examination and report; compensation for disability and death from asbestosis or silicosis.

CASE NOTES

Cited in Woodell v. Starr Davis Co., 77 N.C. App. 352, 335 S.E.2d 48 (1985).

§ 97-62. "Silicosis" and "asbestosis" defined.

Legal Periodicals. — For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

§ 97-63. Period necessary for employee to be exposed.

CASE NOTES

Findings Required to Support Award, etc. —

In accord with main volume. See Woodell v. Starr Davis Co., 77 N.C. App. 352, 335 S.E.2d 48 (1985).

Cited in Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

§ 97-66. Claim where benefits are discontinued.

Where compensation payments have been made and discontinued, and further compensation is claimed, the claim for further compensation shall be made within two years after the last payment in all cases of occupational disease, provided, that claims for further compensation for asbestosis or silicosis shall be governed by the final award as set forth in G.S. 97-61.6. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 3; 1987, c. 729, s. 14.)

Effect of Amendments. — The 1987 amendment, effective August 5, 1987, deleted "whether for disablement, disability or death from lead poisoning" following "and further compensation is claimed" and substituted "in all cases of occupational disease" for "but in all other cases of occupational disease claims for further compensation shall be made within one year after the last payment."

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

CASE NOTES

The Commission is not a court, etc. —

In accord with 1st paragraph in main volume. See Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Commission Is Special Tribunal, etc. —

In accord with 1st paragraph in main volume. See Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Continuing Jurisdiction. — It was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Order Rehearing. — The Commission has the power to order a rehearing on the basis of newly discovered evidence. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Set Aside Judgment. — The Industrial Rule Commission has inherent power analogous to that conferred on courts by § 1A-1, Rule 60 (b) (6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest

in achieving a just and proper determination of a workers' compensation claim requires it. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Because the power to set aside a former judgment is vital to the proper functioning of the judiciary, the Legislature impliedly vested such power in the Commission in conjunction with the judicial power which the Legislature granted it to administer the Workers' Compensation Act. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act. The Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

CASE NOTES

I. IN GENERAL.

Continuing Jurisdiction. — It was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Order Rehearing. — The Commission has the power to order a rehearing on the basis of newly discovered evidence. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Set Aside Judgment. — The Industrial Rule Commission has inherent power analogous to that conferred on courts by § 1A-1, Rule 60 (b) (6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a workers' compensation claim requires it. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Because the power to set aside a former judgment is vital to the proper functioning of the judiciary, the Legislature impliedly vested such power in the Commission in conjunction with the judicial power which the Legislature granted it to administer the Workers' Compensation Act. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act. The Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Taxing Costs of Taking Medical Expert's Deposition. — There is no restriction in either the Workers' Compensation Act or the Rules of the Industrial Commission on the commission's discretion to tax costs of a deposition when the plaintiff requests the deposition of its own medical expert. Harvey v. Raleigh Police Dep't, — N.C. App. —, 355 S.E.2d 147 (1987), affirming commission's order requiring defendant to pay the costs of expert's deposition.

Cited in Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

IV. FINDINGS.

Findings Required. — To enable a proper review of a conclusion concerning disability, the Industrial Commission is required to make specific findings of fact as to a plaintiff's earning capacity. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.

CASE NOTES

Conclusiveness of Commission's Approval. —

An agreement for compensation, when approved by the Commission, is binding on the parties. Roberts v. Carolina Tables of Hickory, 76 N.C. App. 148, 331 S.E.2d 757 (1985).

Change of Condition following Complete Settlement. —

Where plaintiff's initial compensation award for temporary total disabilities was determined by agreement prior to the time plaintiff became fully aware of the extent of his injuries, and plaintiff's initial claim was closed upon the filing of Form 28B, the proper procedure for presenting plaintiff's claim for his alleged permanent disabilities was through the statutorily prescribed procedure for compensation for substantial change of condition. Chisholm v. Diamond Condominium Constr. Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986).

Cited in Hooper v. Liberty Mut. Ins. Co., — N.C. App. —, 353 S.E.2d 248 (1987).

§ 97-83. In event of disagreement, Commission is to make award after hearing.

CASE NOTES

Applied in Long v. Reeves, 77 N.C. App. 830, 336 S.E.2d 98 (1985).

§ 97-84. Determination of disputes by Commission or deputy.

The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event the hearing shall be conducted in the same way and manner prescribed for hearings which are conducted by a member of the Industrial Commission, and said deputy shall proceed to a complete determination of the matters in dispute, file his written opinion within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and the deputy shall cause to be issued an award pursuant to such determination. (1929, c. 120, s. 58; 1951, c. 1059, s. 7; 1987, c. 729, s. 15.)

Effect of Amendments. — The 1987 amendment, effective August 5, 1987, inserted "within 180 days of the close of the hearing record unless time is extended for good cause by the Commission" in the second and third sentences, and inserted "the deputy shall" in the third sentence.

CASE NOTES

Duty of Commission as Fact-Finder. — Appellate courts must follow the "any competent evidence" standard in deciding whether the evidence permits a determination by the Commission, which is the fact-finder. The fact-finder, however, is not required so to view the evidence. Rather, its duty is to weigh the evidence, resolve conflicts therein, and make its own determination as to weight and credibility. Wagoner v. Douglas Battery Mfg. Co., 80 N.C. App. 163, 341 S.E.2d 120 (1986).

Incorrect Notice Did Not Affect Right to Appeal. — Since the law permits appeals only from actual rather than supposed decisions, the incorrect notice of a decision that had not been made had no effect on plaintiff's right to appeal from the decision that was made. Crawford v. McLaurin Trucking Co., 78 N.C. App. 219, 336 S.E.2d 647 (1985).

True Copy to Be Sent to Parties. — This section requires that when the Commission or one of its deputies determines a dispute before it, a copy of the opinion and award be sent to the parties; this necessarily means a true copy. Crawford v. McLaurin Trucking Co., 78 N.C. App. 219, 336 S.E.2d 647 (1985).

§ 97-85. Review of award.

CASE NOTES

Power to Resolve Conflicts. — The Industrial Commission has the duty and authority to resolve conflicts in the testimony, whether medical or not, and the conflict should not always be resolved in favor of the claimant. Cauble v. Macke Co., 78 N.C. App. 793, 338 S.E.2d 320 (1986).

When Application for Review Is Timely. — Application by an employer for review of an award by the Industrial Commission is timely when the application is mailed to the full Commission within 15 days from the date when notice of the award is received. Hubbard v. Burlington Indus., 79 N.C. App. 313, 332 S.E.2d 746 (1985).

Time for Appeal Based on Presumption of Correct Notice. — Though this section requires that appeal from an opinion and award of a Deputy Commissioner be taken within 15 days from the date a party is notified of the Deputy Commissioner's opinion and award, this requirement is based on the presumption that the notice given was correct. Crawford v. McLaurin Trucking Co., 78 N.C. App. 219, 336 S.E.2d 647 (1985).

Incorrect Notice Did Not Affect Right to Appeal. — Since the law permits appeals only from actual rather than supposed decisions, the incorrect notice of a decision that had not been made had no effect on plaintiff's right to appeal from the decision that was made. Crawford v. McLaurin Trucking Co., 78 N.C. App. 219, 336 S.E.2d 647 (1985).

Motion for New Hearing on Ground That Notice Not Given. — Since the North Carolina Industrial Commission has no rule comparable to § 1A-1, Rule 60 (b), and because the Rules of Civil Procedure are applicable, the Industrial Commission should have treated defendant's motion pursuant to this section and Industrial Commission Rule XXI for a new hearing on the ground that he had not received notice of hearing in which plaintiff was awarded compensation as one made pursuant to § 1A-1, Rule 60 (b) to be relieved from a judgment. Long v. Reeves, 77 N.C. App. 830, 336 S.E.2d 98 (1985).

Party moving to reopen case must show good grounds for allowance of the motion. Pickrell v. Motor Convoy, Inc., 82 N.C. App. 277, 346 S.E.2d 164, cert. granted, — N.C. —, 349 S.E.2d 864 (1986).

Taking of Additional Evidence, etc. —

In accord with the last paragraph in the main volume. See Chisholm v. Diamond Condominium Constr. Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986).

The question of whether to reopen a case for the taking of additional evidence is addressed to the sound discretion of the Commission, and its decision is not reviewable on appeal in the absence of a manifest abuse of that discretion. Pickrell v. Motor Convoy, Inc., 82 N.C. App. 277, 346 S.E.2d 164, cert. granted, — N.C. —, 349 S.E.2d 864 (1986).

Remand for Misapprehension of Law. — Where facts were found by the Commission under the misapprehension that the law required a finding for the plaintiff if there was any competent evidence to support such a finding, the Court of Appeals was empowered to remand the case so that the evidence could be considered in its true legal light. Cauble v. Macke Co., 78 N.C. App. 793, 338 S.E.2d 320 (1986).

Cited in Cockman v. PPG Indus., 84 N.C. App. 101, 351 S.E.2d 771 (1987).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

CASE NOTES

I. IN GENERAL.

Cited in Gallimore v. Daniels Constr. Co., 78 N.C. App. 747, 338 S.E.2d 317 (1986); Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

III. JURISDICTION.

The reviewing court is not bound, etc.

Notwithstanding this section, the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal, even if there is evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record. Dockery v. McMillan, — N.C. App. —, 355 S.E.2d 153 (1987).

IV. FINDINGS OF COMMISSION.

Findings Must Be Specific, etc. — The Industrial Commission is required to make specific findings as to the facts upon which a compensation claim is based, including the extent of a claimant's disability. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

V. SCOPE OF REVIEW.

The Commission's legal conclusions are subject to court review. — In accord with main volume. See Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

In passing upon an appeal from an award, etc. —

In accord with 1st paragraph in main volume. See Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985); McBride v. Peony Corp., — N.C. App. —, 352 S.E.2d 236 (1987).

In accord with 3rd paragraph in main volume. See Woodell v. Starr Davis Co., 78 N.C. App. 352, 335 S.E.2d 48 (1985).

And Whether Findings Support Commission's Conclusions, etc. —

On appeal from an award of the Industrial Commission, the appellate court's review is limited to the questions of whether the findings made by the Commission are supported by competent evidence in the record and whether these findings support the conclusions of law drawn by the Commission. Little v. Penn Ventilator Co., 75 N.C. App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985), aff'd in part and rev'd in part, 317 N.C. 206, 345 S.E.2d 204 (1986).

Commission Is Sole Judge of Weight, etc.—

In accord with 1st paragraph in main volume. See Woodell v. Starr Davis Co., 78 N.C. App. 352, 335 S.E.2d 48 (1985); Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

When Supported by Competent Evidence. —

In accord with 1st paragraph in main volume. See Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985).

Even If Evidence Would Also Have Supported Contrary Findings. —

In accord with 1st paragraph in main volume. See Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985); Woodell v. Starr Davis Co., 78 N.C. App. 352, 335 S.E.2d 48 (1985).

VII. REMAND AND REHEARING.

Remand Where Findings Insufficient. —

In accord with 3rd paragraph in main volume. See Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Remand Where Facts Found under Misapprehension of Law. — In accord with 1st paragraph in main volume. See Cauble v. Macke Co., 78 N.C. App. 793, 338 S.E.2d 320 (1986).

§ 97-86.2. Interest on awards after hearing.

In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant. (1981, c. 242, s. 1; 1985, c. 598; 1987, c. 729, s. 16.)

Effect of Amendments. — The 1987 amendment, effective with respect to claims filed on or after August 5, 1987, substituted "initial hearing on the claim" for "original order, which granted or denied the award" near the end of the first sentence.

§ 97-88. Expenses of appeals brought by insurers.

CASE NOTES

Fees Not Awarded Where Only Claimant Appeals. — In its sound discretion, the Industrial Commission may award claimant attorney's fees in cases in which defendant insurer appealed. However, the Industrial Commission may not award attorney's fees pursuant to this section in cases in which only the claimant appealed. Harwell v. Thread, 78 N.C. App. 437, 337 S.E.2d 112 (1985).

Remand for Determination of Attorney's Fees. — Where the language in the Commission's order regarding this section was so ambiguous as to preclude review as to whether the Commission believed it lacked authority to award attorney's fees where both the insurer and the claimant appealed, the case could be remanded to the Commission for a discretionary determination as to an award of attorney's fees to claimant. Harwell v. Thread, 78 N.C. App. 437, 337 S.E.2d 112 (1985).

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.

CASE NOTES

Process of filing for approval does not result in notice to the claimant; the statute provides a penalty for noncompliance, and its purpose (to ensure that medical service providers are not overcharging for services and products) is unrelated to the employee's claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Failure to obtain approval for payments of medical expenses does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination by disability; penalty for refusal to make report; when insurance carrier liable.

CASE NOTES

Report of Occupational Disease. — Subdivision (a) of this section requires an employer to report any injury by accident if it keeps the employee from work for more than one day. Presumably this would include notice of an occupational disease which is considered an injury by accident. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Filing of employer's report, etc. — The notice requirement of subdivision (a) of this section does not invoke the jurisdiction of the Commission without the employee filing a claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Employer's failure to notify the Commission pursuant to subdivision (a) of this section does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits; self-insured employers regulated by Commissioner of Insurance.

CASE NOTES

Cited in Dockery v. McMillan, — N.C. App. —, 355 S.E.2d 153 (1987).

§ 97-94. Employers required to give proof within 30 days that they have complied with preceding section; fine for not keeping liability insured; review; liability for compensation; failure to secure payment of compensation a misdemeanor.

(a) Every employer subject to the compensation provisions of this Article shall, within 30 days, after this Article takes effect, file with the Industrial Commission, in form prescribed by it, and thereafter, annually or as often as may be necessary, evidence of his compliance with the provisions of G.S. 97-93 and all others relating thereto.

(b) Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation shall be punished by a fine of one dollar ($1.00) for each employee, but not less than fifty dollars ($50.00) nor more than one

hundred dollars ($100) for each day of such refusal or neglect, and until the same ceases; and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this Article or at law at the election of the injured employee.

The fine herein provided may be assessed by the Industrial Commission in an open hearing, with the right of review and appeal as in other cases. Enforcement of the fine shall be made by the Office of the Attorney General.

(c) Any employer required to secure the payment of compensation under this Article who willfully refuses or neglects to secure such compensation shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1929, c. 120, s. 68; 1945, c. 766; 1963, c. 499; 1973, c. 1291, s. 13; 1985, c. 119, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 54; 1987, c. 729, s. 17.)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, substituted "Industrial Commission" for "Commissioner of Insurance" in subsection (a).

The 1987 amendment, effective August 5, 1987, substituted "one dollar ($1.00)" for "ten cents (10¢)," "fifty dollars ($50.00)" for "one dollar ($1.00)," "one hundred dollars ($100)" for "fifty dollars ($50.00)" and "at the election of the injured employee" for "in the same manner as provided in G.S. 97-14" in the first sentence of subsection (b), substituted "Industrial Commission" for "Commissioner of Insurance" in the first sentence of the second paragraph of subsection (b), and added the second sentence of the second paragraph of subsection (b).

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.

(k) Every group of two or more employers who have pooled their liabilities pursuant to G.S. 97-93 shall pay a tax upon premiums received in this State in the same manner as the tax is calculated and paid by insurance carriers insuring employers in this State and set forth in subsections (c), (d), (e), and (f) above. (1929, c. 120, s. 73; 1931, c. 274, s. 13; 1947, c. 574; 1961, c. 833, s. 13; 1977, c. 828, s. 7; 1985, c. 119, s. 2; 1985 (Reg. Sess., 1986), c. 928, s. 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, added subsection (k).

Article 3.

Security Funds.

§ 97-106. Definitions.

As hereafter used in this Article, unless the context or subject matter otherwise requires:

"Carrier" means either a stock carrier or a mutual carrier, as the context may require.

"Commissioner" means the Insurance Commissioner of this State.

"Fund" mean either the stock fund or the mutual fund as the context may require.

"Funds" mean the stock fund and the mutual fund.

"Fund year" means the calendar year.

"Insolvent stock carrier" or "insolvent mutual carrier" means a stock carrier or a mutual carrier, as the case may be, which has been determined to be insolvent, or for which or for the assets of which a receiver has been appointed by a court or public officer of competent jurisdiction and authority.

"Mutual carrier" means any mutual corporation or association and any reciprocal or interinsurance exchange authorized to transact the business of workmen's compensation insurance in this State, except an insolvent mutual carrier.

"Mutual fund" means the Mutual Workmen's Compensation Security Fund created by this Article.

"Stock carrier" means any stock corporation authorized to transact the business of workmen's compensation insurance in this State, except an insolvent stock carrier.

"Stock fund" means the Stock Workmen's Compensation Security Fund created by this Article.

"Workmen's Compensation Act" means the Workmen's Compensation Act of the State of North Carolina, being G.S. 97-1 to 97-101 as amended and supplemented or, with respect to claimants or insureds that are residents of this State at the time of the insured event, the Federal Longshoremen's and Harbor Worker's Compensation Act. (1935, c. 228, s. 2; 1941, c. 298, s. 1; 1987, c. 752, s. 20.)

Effect of Amendments. — The 1987 amendment, effective January 1, 1986, added "or, with respect to claimants or insureds that are residents of this State at the time of the insured event, the Federal Longshoremen's and Harbor Worker's Compensation Act" at the end of the paragraph defining "Workmen's Compensation Act."

§ 97-107. Stock Workers' Compensation Security Fund created.

There is hereby created a fund to be known as "The Stock Workers' Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the Workers' Compensation Act for employments insured in insolvent stock carriers and for valid claims for the return of unearned premiums. Such fund shall be applicable to the payment of valid claims for the return of unearned premiums not exceeding ten thousand dollars ($10,000) per policy and for compensation or death

benefits heretofore or hereafter made pursuant to the Workers' Compensation Act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this Article, of an insolvent stock carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by stock carriers, as herein defined, all property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the Commissioner of this State in accordance with the provisions of this Article. (1935, c. 228, s. 3; 1979, c. 714, s. 2; 1987, c. 864, s. 54.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added "and for valid claims for the return of unearned premiums" at the end of the first sentence, and inserted "for the return of unearned premiums not exceeding ten thousand dollars ($10,000) per policy and" in the second sentence.

§ 97-113. Payment of claim from stock fund when carrier insolvent; subrogation of employer paying claim; recovery against employer or receiver of insolvent carrier.

(a) A valid claim for benefits, or installments thereof, heretofore or hereafter made pursuant to the Workers' Compensation Act, and for valid claims for the return of unearned premiums not exceeding ten thousand dollars ($10,000) per policy, which has remained or shall remain due and unpaid for 60 days, by reason of default by an insolvent stock carrier, shall be paid from the stock fund in the manner provided in this section. Any person in interest may file with the Commissioner an application for payment of benefits from the stock fund on a form prescribed and furnished by the Commissioner. If there has been an award, final or otherwise, a certified copy thereof shall accompany the application. The Commissioner shall thereupon certify to the State Treasurer such award for payment according to the terms of the same, whereupon payment shall be made by the State Treasurer.

(1935, c. 228, s. 9; 1971, c. 548, ss. 1, 2; 1979, c. 714, s. 2; 1987, c. 864, s. 55.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, inserted "and for valid claims for the return of unearned premiums not exceeding ten thousand dollars ($10,000) per policy" in the first sentence.

§ 97-114. Mutual Workers' Compensation Security Fund created.

There is hereby created a fund to be known as "The Mutual Workers' Compensation Security Fund," for the purpose of assuring to persons entitled thereto the benefits provided by the Workers' Compensation Act for employments insured in insolvent mutual carriers and the valid claims for the return of unearned premiums.

Such fund shall be applicable to the payment of valid claims for the return of unearned premiums not exceeding ten thousand dollars ($10,000) per policy and for benefits heretofore or hereafter made pursuant to the Workers' Compensation Act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this Article, of an insolvent mutual carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by mutual carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the Commissioner in accordance with the provisions of this Article. The State Treasurer shall be the custodian of the fund, and shall invest its assets in accordance with the provisions of G.S. 147-69.2 and 147-69.3. (1935, c. 228, s. 10; 1971, c. 548, s. 3; 1979, c. 467, s. 6; c. 714, s. 2; 1987, c. 864, s. 56.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added "and the valid claims for the return of unearned premiums" at the end of the first sentence and inserted "for the return of unearned premiums not exceeding ten thousand dollars ($10,000) per policy and" in the second sentence.

§ 97-119. Notice of insolvency; report of claims and unpaid awards.

Forthwith upon any carrier becoming an insolvent stock carrier, or an insolvent mutual carrier, as the case may be, the Commissioner shall so notify the North Carolina Industrial Commission, and the North Carolina Industrial Commission shall immediately advise the Commissioner

(4) Of all claims for return of unearned premiums not exceeding ten thousand dollars ($10,000) per policy. (1935, c. 228, s. 15; 1987, c. 864, s. 57.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added subdivision (4).

§§ 97-123 to 97-129: Reserved for future codification purposes.

Article 4.

North Carolina Self-Insurance Guaranty Association.

§ 97-130. Definitions.

As used in this Article:

(1) "Association" means the North Carolina Self-Insurance Guaranty Association established by G.S. 97-131.

(2) "Board" means the Board of Directors of the Association established by G.S. 97-132.

(3) "Commissioner" means the North Carolina Commissioner of Insurance.

(4) "Covered claim" means an unpaid claim against an insolvent self-insurer that relates to an injury that occurs while the self-insurer is a member of the Association and that is compensable under this Chapter.
(5) "Fund" means the North Carolina Self-Insurance Guaranty Fund established by G.S. 97-133.
(6) "Member self-insurer" or "member" means a self-insurer which is authorized by the Commissioner to self-insure pursuant to G.S. 97-93, 97-94 and 97-96.
(7) "Plan" means the Plan of Operation authorized by G.S. 97-134.
(8) "Self-insurer" means either: (i) an individual employer who has demonstrated under G.S. 97-93 the financial ability to directly pay compensation in the amounts and manner and when due as provided in this Chapter or (ii) a group of two or more employers who have agreed to pool their liabilities under this Chapter pursuant to G.S. 97-93. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 18, makes this Article effective October 1, 1986.

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, added new subdivision (6), renumbered former subdivision (6) as present subdivision (7), renumbered former subdivision (7) as present subdivision (8), and in present subdivision (8) deleted "or 'member self-insurer'" following "'Self-insurer'" at the beginning thereof.

§ 97-131. Creation.

(a) There is created a nonprofit unincorporated legal entity to be known as the North Carolina Self-Insurance Guaranty Association. The Association is to provide mechanisms for the payment of covered claims under self-insurance coverage, to avoid excessive delay in payment, to avoid financial loss to claimants because of the insolvency of a self-insurer, and to assist, when called upon to do so by the Commissioner, in the detection of self-insurer insolvencies.

(b) All individual and group self-insurers shall be and remain members of the Association as a condition of authority to self-insure in this State under G.S. 97-93. The Association shall perform its functions under a Plan of Operation established or amended, or both, by the Board and approved by the Commissioner, and shall exercise its powers through the Board.

(1) A self-insurer shall be deemed to be a member of the Association for purposes of another self-insurer's insolvency, as defined in G.S. 97-135, when:
   a. The self-insurer is a member of the Association when an insolvency occurs, or
   b. The self-insurer has been a member of the Association at some point in time during the 12-month period immediately preceding the insolvency in question.
(2) A self-insurer shall be deemed to be a member of the Association for purposes of its own insolvency if it is a member when the compensable injury occurs.
(3) In determining the membership of the Association pursuant to subdivisions (1) and (2) of this subsection for any date after the effective date of this Article, no employer or group of employers claiming self-insurer status may be

deemed to be a member of the Association on any date after the effective date of this Article, unless that employer or group of employers is at that time authorized as a self-insurer by the Commissioner pursuant to G.S. 97-93, 97-94, and 97-96. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 2.)

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, deleted the former last sentence of subsection (a), which read "It is declared that the Association is an instrumentality of the State, provided that the debts and liabilities of the Association shall not constitute debts and liabilities of the State," inserted "by the Board" in the second sentence of subsection (b), and rewrote subdivision (b)(2).

§ 97-132. Board of directors.

The Board shall consist of not less than nine persons serving terms as established in the Plan. The members of the Board shall be selected by the member self-insurers, subject to the approval of the Commissioner, and shall serve for terms which shall not exceed three years. If no members of the Board are selected within 60 days after the effective date of this Article, the Commissioner may appoint the initial members of the Board. In approving selections to the Board, the Commissioner shall consider, among other things, whether all member self-insurers are fairly represented. Members of the Board may be reimbursed from the assets of the Association for expenses incurred by them as members of the Board. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 3.)

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, substituted "and shall serve for terms which shall not exceed three years" for "until the next annual meeting of the Board" at the end of the second sentence.

§ 97-133. Powers and duties of the Association.

(a) The Association shall:

(1) Obtain from each member self-insurer and file with the Commissioner individual reports specifying the aggregate benefits each member paid during the previous calendar year, and the annual standard premium that would have been paid by the individual member self-insurer during the previous calendar year, pursuant to manual rates established by the North Carolina Rate Bureau and using the experience rating procedure approved by the Commissioner for that member self-insurer or the annual premium collected by each group member self-insurer during the prior calendar year. These reports shall be due on or before July 15 following the close of that calendar year, except that this deadline may be extended by the Commissioner for up to three additional months for good cause shown.

(2) Assess each member of the Association as follows:

a. Each individual member self-insurer shall be annually assessed an amount equal to one-half of one percent (0.5%) of the annual standard premium that would have been paid by that member self-insurer for workers' compensation insurance during the prior cal-

endar year; and payment to the Association shall be made no later than September 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual standard premium for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual standard premium. Each group member self-insurer shall be annually assessed an amount equal to one-half of one percent (0.5%) of the annual premium collected by the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than September 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this one-half of one percent (0.5%) assessment.

b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

c. If a self-insurer is a member of the Association for less than a full calendar year, the annual standard premium shall be adjusted by that portion of the year the self-insurer is not a member of the Association.

d. If application of the contribution rates referenced in sub-subdivisions a. and b. of this subdivision would produce an amount in excess of the one million dollar ($1,000,000) limits of the fund, an equitable proration may be made; provided that every self-insurer that becomes a member of the Association shall pay an initial assessment, in an amount established by the Board, regardless of the size of the fund at the time the member joins the Association.

(3) Administer a fund, to be known as the North Carolina Self-Insurance Guaranty Fund, which shall receive the assessments required in subdivision (2) of this subsection. Once the Fund reaches one million dollars ($1,000,000), no further assessments shall be made except initial assessments of new member self-insurers that are required to be made in subdivision (2)d. of this subsection. Assessments may be subsequently made only to maintain the Fund at a level of one million dollars ($1,000,000). In its discretion, the Board may determine that the assets of the Fund should be segregated, or, that a separate accounting shall be made, in order to identify that portion of the Fund which represents assessments paid by individual self-insurers and that portion of the Fund which represents assessments paid by group self-insurers. If the Board determines to segregate the Fund in this manner, the Association shall thereafter pay covered claims against individual member self-insurers from that portion of the Fund which represents assessments against individual self-insurers and shall thereafter pay covered claims against group member self-insurers from that portion of the Fund which represents assessments against group self-insurers. The cost of administration incurred by the Association shall be borne by the

Fund and the Association is authorized to secure reinsurance and bonds and to otherwise invest the assets of the Fund to effectuate the purpose of the Association, subject to the approval of the Commissioner. All earnings from investment of Fund assets shall be placed in or credited to the Fund.

The Association may purchase primary excess insurance from an insurer licensed by the Commissioner for the appropriate lines of authority to defray its exposure to loss occasioned by the default of one of its members. The terms of any excess insurance so purchased shall be limited to providing coverage of liabilities which exceed the Fund's assets after the payment by member self-insurers of the maximum post-insolvency assessment provided in G.S. 197-133(c)(1) herein and the Association shall fund any such purchase by levying a special assessment on its members for this purpose or by application of any unencumbered earnings of the Fund or any other available funds. The Association may obtain from each member any information the Association may reasonably require in order to facilitate the securing of this primary excess insurance. The Association shall establish reasonable safeguards designed to insure that information so received is used only for this purpose and is not otherwise disclosed;

(4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article; provided that any assessments made to pay such claims may be credited towards the tax paid by the self-insurers under G.S. 97-100;

(5) After paying any claim resulting from a self-insurer's insolvency, be subrogated to the rights of the injured employee and dependents and be entitled to enforce liability against the self-insurer by any appropriate action brought in its own name or in the name of the injured employee and dependents;

(6) Assess the Fund in an amount necessary to pay only:
   a. The obligations for the Association under this Article subsequent to an insolvency;
   b. The expenses of handling covered claims subsequent to an insolvency;
   c. The cost of examinations under G.S. 97-137; and
   d. Other expenses authorized by this Article;

(7) Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation; and deny all other claims. The Association may review settlements to which the insolvent self-insurer was a party to determine the extent to which such settlements may be properly contested;

(8) Notify such persons as the Commissioner directs under G.S. 97-136;

(9) Handle claims through its employees or through one or more self-insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but designation of a member self-insurer as a servicing facility may be declined by such self-insurer;

(10) Reimburse each servicing facility for obligations of the Association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the Association;

(11) Pay the other expenses of the Association authorized by this section; and

(12) Establish in the Plan a mechanism to calculate the assessments required by subdivisions (1), (2), and (3) of this subsection by a simple and equitable means to convert from policy or fund years that are different from a calendar year.

(b) The Association may:

(1) Employ or retain such persons as are necessary to handle claims and perform other duties of the Association;

(2) Borrow funds necessary to effect the purposes of this Article in accord with the Plan;

(3) Sue or be sued;

(4) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this section; and

(5) Perform such other acts as are necessary or proper to effectuate the purpose of this section.

(c) In the event that the assets of the Fund are not sufficient to pay the obligations of the Association, then the Association shall impose an additional assessment upon its members, which shall be known as a post-insolvency assessment which shall be imposed as follows:

(1) Each individual member self-insurer shall be assessed in an amount not to exceed two percent (2%) each year of the annual standard premium that would have been paid by that member self-insurer during the prior calendar year. The assessments of each individual member self-insurer shall be in the proportion that the annual standard premium of the individual member self-insurer for the premium calendar year bears to the annual standard premium of all individual member self-insurers for the preceding calendar year. For group member self-insurers, the assessment shall not exceed two percent (2%) each year the annual premium collected by that group member self-insurer during the prior calendar year. The assessments of each group member self-insurer shall be in the proportion that the annual collected premium of the group member self-insurer for the premium calendar year bears to the annual collected premium of all group member self-insurers for the preceding calendar year.

(2) Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

(3) The Association may exempt or defer, in whole or in part, the assessment of any member self-insurer, if the assess-

ment would cause that member's financial statement to reflect liabilities in excess of assets.

(4) Delinquent assessments, except as provided in subdivision (3) of this subsection, shall bear interest at the rate to be established by the Board, but not to exceed the discount rate of the Federal Reserve Bank, Richmond, Virginia, on the due date of the assessment, plus four percent (4%) annually, computed from the due date of the assessment.

(5) The Association shall establish in the Plan a mechanism to calculate the assessments required by subdivision (1) of this subsection by a simple and equitable means to convert from policy or fund years that are different from a calendar year.

(d) No individual member self-insurer may be assessed in any calendar year an amount greater than two and one-half percent (2.5%) of the annual standard premium that would have been paid by that individual member self-insurer during the prior calendar year. No group member self-insurer may be assessed in any calendar year an amount greater than two and one-half percent (2.5%) of the annual premium collected by that group member self-insurer during the prior calendar year. If the maximum assessment does not provide in any one year an amount sufficient to make all necessary payments, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. There shall be established in the Plan a mechanism to calculate the assessments required by this section by a simple and equitable means to convert from policy or fund years that are different from a calendar year. (1985 (Reg. Sess., 1986), c. 928, s. 1(a); 1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, ss. 4-10.)

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 928, s. 1(a), effective Oct. 1, 1986, added the second sentence of subdivision (a)(4) of this section, as enacted by Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 1.

The 1987 amendment, effective July 1, 1987, in the first sentence of subdivision (a)(1) substituted "individual member self-insurer" for "each member self-insurer" and inserted a comma following "previous calendar year," and added "or the annual premium collected by each group member self-insurer during the prior calendar year" at the end of that sentence; in paragraph (a)(2)d substituted "in excess of the one million dollar ($1,000,000) limits of the fund" for "in excess of the limits of the Fund," substituted "may be made" for "shall be made," and added the proviso at the end of that paragraph; rewrote subdivision (a)(3); substituted "G.S. 97-137" for "subdivision (8) of this subsection" at the end of paragraph (a)(6)c; substituted "G.S. 97-136" for "subdivision (7) of this subsection" at the end of subdivision (a)(8); rewrote the introductory language of subsection (c), which read "The following pertains to post-insolvency assessment"; and rewrote subdivision (c)(1).

§ 97-134. Plan of Operation.

The Plan is as follows:

(1) The Association shall submit to the Commissioner a Plan and any amendments necessary or suitable to assure the fair, reasonable, and equitable administration of the Association. The Plan and any amendments become effective upon approval in writing by the Commissioner. If the Association at any time fails to submit a Plan or suitable amendment to the Plan the Commissioner shall, after no-

tice and hearing, adopt such reasonable rules as are necessary or advisable to effectuate this Article. Such rules shall continue in force until modified by the Commissioner or superseded by a Plan submitted by the Association and approved by the Commissioner.

(2) All member self-insurers shall comply with the Plan.

(3) The Plan shall:

a. Establish the procedures whereby all the powers and duties of the Association under G.S. 97-133 will be performed;

b. Establish procedures for handling assets of the Association;

c. Adopt a reasonable mechanism and procedure to achieve equity in assessing the funds required in G.S. 97-133. Consideration shall be given to adjustments for audited payroll, differential effects caused by rate changes, and other relevant factors;

d. Establish the amount and method of reimbursing members of the Board under G.S. 97-132;

e. Establish procedures by which claims may be filed with the Association and establish acceptable forms of proof of covered claims. A list of such claims shall be periodically submitted to the Association;

f. Establish regular places and times for meetings of the Board;

g. Establish procedures for records to be kept of all financial transactions of the Association, its agents, and the Board;

h. Provide that any member self-insurer aggrieved by any final action or decision of the Association may appeal to the Commissioner within 30 days after the action or decision;

i. Establish the procedures whereby selections for the Board shall be submitted to the Commissioner; and

j. Contain additional provisions necessary or proper for the execution of the powers and duties of the Association. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 11.)

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, rewrote the third sentence of subdivision (1), which read "If the Association fails to submit a suitable Plan within 90 days after October 1, 1986, or if at any time thereafter the Association fails to submit suitable amendments to the Plan, the Commissioner shall, after notice and hearing, adopt such reasonable rules as are necessary or advisable to effectuate this Article."

§ 97-135. Insolvency.

A member self-insurer shall be insolvent for the purposes of this Article under the following circumstances:

(1) Determination of insolvency by a court of competent jurisdiction; or

(2) Institution of bankruptcy proceedings by or regarding the member self-insurer; or

(3) The Board determines that the self-insurer's total liabilities exceed its total assets or the self-insurer is unable or

ceases to pay its debts as they fall due or in the ordinary course of business. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 12.)

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, substituted "or" for "and" at the end of subdivision (1), added "or" at the end of subdivision (2), and added subdivision (3).

§ 97-136. Powers and duties of the Commissioner.

(a) The Commissioner shall notify the Association of the existence of an insolvent member self-insurer not later than 30 days after he receives notice of an insolvency pursuant to the standards set forth in G.S. 97-135.

(b) The Commissioner may:

(1) Require that the Association notify the insureds of the insolvent member self-insurer and any other interested parties of the insolvency and of their rights under this Article. Such notifications shall be by mail at their last known addresses, where available; but if required information for notification is not available, notice by publication in a newspaper of general circulation in this State shall be sufficient; and

(2) Revoke the designation of any servicing facility if he finds claims are being handled unsatisfactorily. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-137. Examination of the Association.

The Association shall be subject to examination and regulation by the Commissioner. The Board shall submit, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the Commissioner. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-138. Tax exemption.

The Association shall be exempt from payment of all fees and all taxes levied by this State or any of its political subdivisions, except taxes levied on real or personal property. (1985 (Reg. Sess., 1986), c. 928, s. 1(b).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 928, s. 14 makes this section effective October 1, 1986.

§ 97-139. Immunity.

There shall be no liability on the part of and no cause of action of any nature may arise against any member self-insurer, the Association, or its agents or employees, the Board or its individual members, or the Commissioner or his representatives for any acts or omissions taken by them in the performance of their powers and duties under this Article. The immunity established by this section shall not extend to willful neglect or malfeasance that would otherwise be actionable. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-140. Nonduplication of recovery.

Any person having a covered claim that may be recovered under more than one insurance or self-insurance guaranty association or its equivalent shall seek recovery first from the association of the place or residence of the claimant. Any recovery under this Article shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-141. Stay of proceedings.

All proceedings under this Chapter to which the insolvent member self-insurer is a party either before the Industrial Commission or a court in this State and the running of all time periods against either the insolvent member self-insurer or the Association under this Chapter shall be stayed for 60 days from the date of notice to the Association of the insolvency in order to permit the Association to investigate, prosecute, or defend properly any petition, claim, or appeal under this Chapter, provided that the payment of weekly compensation for incapacity is made whenever time periods or proceedings affecting the payment of weekly compensation are stayed. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-142. Disposition of assets upon dissolution.

In the event of dissolution of the Association, all assets remaining after provision for satisfaction of all outstanding claims shall be distributed to the State Treasurer for establishment of a reserve to satisfy potential claims against the Association and, all such claims being satisfied, for inclusion in the general fund of the State. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1987

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1987 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

LACY H. THORNBURG

Attorney General of North Carolina